IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 430 OF 2007

The State of Maharashtra)
through Khar Police Station)...Appellant

versus

Alister Anthony Pareira)
1, Silvaraj, 43 Carter Road,)
Bandra (West), Mumbai.)..Respondent

WITH

CRIMINAL APPEAL NO. 566 OF 2007

The State of Maharashtra)
through Khar Police Station)..Appellant

versus

Alister Anthony Pareira)
1, Silvaraj, 43 Carter Road,)
Bandra (West), Mumbai.)..Respondent

WITH

CRIMINAL APPEAL NO. 475 OF 2007

Alister Anthony Pereira)
aged 21 years, residing at)
Silvaraj, 43 , St. Paul Road,)
Bandra, Mumbai.)..Appellant

versus

The State of Maharashtra)
through Khar Police Station)..Respondent.

Mr. Ravi Kadam, Advocate General, with Mr. S.R. Borulkar, Public Prosecutor, for the State.

Mrs. Manjula Rao for the respondent in Appeal Nos.430 and 566 of 2007 and for the appellant in Appeal No. 475 of 2007.

Mr. S.Y. Katkade, *amicus curiae*, for the labourers/victims.

CORAM: **SWATANTER KUMAR, C.J.** &
SMT. RANJANA DESAI, J.

Judgment reserved on : July 27, 2007
Judgment delivered on: September 06,2007

JUDGMENT (Per Swatanter Kumar, C.J.):

I. **Facts**

Alister Anthony Pereira was charged and faced trial in accordance with law, for offences punishable under Sections 304 Part II and 338 of the Indian Penal Code ("IPC"). The learned 1st Adhoc Additional Sessions Judge, Sewree, Mumbai, vide his judgment and order of conviction dated 13th April, 2007, found the accused guilty of

offences punishable under Sections 304 A and 337 of the IPC and sentenced him to suffer simple imprisonment for a term of six months and to pay a fine of Rs.5,00,000/- for the offence under section 304A and to suffer 15 days simple imprisonment for offence under Section 337 of IPC. Against the above judgment dated 13th April, 2007, the State filed two different appeals. Appeal No. 566 of 2007 was filed under Section 378 (3) read with Rule 19 of Chapter XXVI of the Bombay High Court (A.S.) Rules, 1960, along with Criminal Application No. 1524 of 2007 for leave to file Appeal against the order acquitting the accused of the offences punishable under Sections 304 Part II and 338 of the IPC. Criminal Appeal No. 430 of 2007 was filed by the State praying for leave under Section 377 (1) of the Code of Criminal Procedure, 1973, for enhancement of the sentence awarded by the trial court vide order of sentence dated 13th April, 2007. Criminal Appeal No. 475 of 2007 was filed by the accused for setting aside the conviction and order of sentence passed against him under Section 304 A and 337 of the Indian Penal Code vide judgment and order dated 13th April, 2007, in Sessions Case No. 59/07.

2. By the order dated 6th June, 2007, leave to file appeal against the

judgment of the trial Court dated 13th April, 2007, in Sessions Case No.59 of 2007, was granted to the State, whereafter all the appeals were heard together and they are being disposed of by this common judgment.

3. First Information Report (FIR) No. 436 of 2006 dated 12th November, 2006 was recorded in furtherance to the statement of P.W.2, Panchanadan Pareamalai. The statement of this witness was recorded at Exhibit 13. In the gist recorded by the Investigating Officer, it is stated that the accused while driving his own Car No. MH-01-R-580 under the influence of liquor caused accident and death of 7 persons and injured other 8 persons. The statement of Panchanandan (P.W.2) is attached to the form of FIR recorded under Sections 304 (II), 279, 337, 338, 336, 427 of the IPC and Sections 66 (1) (b) of the Bombay Prohibition Act. Panchanandan (P.W.2), in his statement stated that he was working with New India Construction Company and 9 labourers were working under him. Temporary hutments were constructed near Railway Colony. The labourers were sleeping on footpath. At about 3.30 a.m. on 12th November, 2006, he saw some persons driving a car with tape recorder on at high pitch and they were

also making noise. The car went at high speed and met with an accident on Carter Road while going back towards Bandra Side. The driver took the car suddenly towards the left side of the road and ran over the people sleeping on the footpath and also dashed against the huts. The car crushed seven persons and injured eight persons. He raised hue and cry and reported the matter to the police. He saw that the front wheel of the car was damaged and even number plate of the car was broken. One girl and two boys got down from the car and ran away from the spot and in the meanwhile a police van came there. He informed the police of the accident whereafter the police van removed three persons who were still sitting in the car of the accused. The person who was driving the car was asked his name, etc. by the police and he gave his name as Alister Anthony Pereira. The accused and other persons were drunk and were taken into custody by the police. After some time, the police vehicles came there and took the injured to the hospital and he accompanied those persons. The doctor upon their examination declared six persons dead. One person was admitted in the Intensive Care Unit, some were admitted for treatment at the Hospital and others were discharged after first aid. According to the FIR, the statement was recorded on the computer and was duly

explained to Panchanandan (P.W.2) in Hindi and Marathi which he found to be correct and signed the same.

4. The case of the prosecution further is that from the car a bottle was recovered, contents of which were subjected to chemical analysis and it was found that it contained 42 per cent v/v ethyl alcohol vide report of the C.A. at Exhibit-48. The blood sample of the accused was taken and sent for analysis. The report is at Exhibit-49 in which it was found that the blood of the accused contained 0.112% W/V ethyl alcohol. Pravin Sajjan Mohite (P.W.12) was the Photographer who took photographs of the scene of offence. The photographs were also taken by the Vehicle Inspector who submitted his report at Exhibit-42. The panchanama was prepared in presence of panchas. After recording the statements of the witnesses under Section 161 of the Criminal Procedure Code, 1973, (Cr.P.C.) along with the reports and other documents, charge-sheet (challan) was filed under Section 173 of the Cr.P.C. before the Court of competent jurisdiction. The learned Magistrate found that the offences mentioned in the charge-sheet were exclusively triable by the Court of Sessions and consequently committed the case to the Court of Sessions for trial.

5. Upon appearance of the accused and after supply of documents, the learned Sessions Judge vide his order dated 12th March, 2007 framed the following charges against the accused.

> " That on 12.11.2006 between 3.45 to 4.00 a.m. you have driven the Car bearing No. MH-01-R-580 rashly and negligently with knowledge that people are sleeping on footpath and likely to cause death of those persons slept over footpath and thereby caused the death of eight persons who were sleeping on footpath at Carter Road, Bandra (W), Mumbai and thereby committed an offence punishable under Section 304 Part II IPC which is within my cognizance.
>
> Secondly, on the above date, time and place you have driven the vehicle in rashly and negligent manner and thereby caused grievous injury to seven persons who were sleeping on footpath and thereby committed an offence punishable under Section 338 of IPC which is within my cognizance.
>
> And you are hereby directed that you be tried by me for the above charges."

To the above charge, the accused pleaded not guilty and claimed to be tried.

6. The prosecution examined 18 witnesses in support of its case

and tendered various documents including postmortem notes (Exhibit-18), medical certificates (Exhibits-33 to 40), FIR (Exhibit-13) and panchnama (Exhibit-28). The incriminating material appearing in the evidence was put to the accused in his statement recorded under Section 313 of the Cr.P.C. on 12th April, 2007, wherein the accused stated that he did not want to lead any defence and also stated that there was failure of the engine of the car as a result of which the car went out of his control and dashed the road divider. He could not control the vehicle and made attempts to stop the car by applying brakes but in vain.

7. As already noticed, the trial Court vide its judgment and order dated 13th April, 2007, acquitted accused of offence punishable under Section 304 Part-II of IPC and found the accused guilty of offence punishable under Sections 304-A and 337 of IPC and sentenced him, while denying him the benefit of the provisions of Section 4 of the Probation of Offenders Act. The operative part of the order reads thus:

> " Accused Alister Anthony Pareira is hereby acquitted for an offence punishable under Section 304 Part II IPC and Section 338 of IPC.

Accused Alister Anthony Pareira is hereby convicted for an offence punishable under Section 304A of IPC and sentenced to suffer simple imprisonment of six months with fine of Rs. 5,00,000/- (Rupees Five lakhs only), in default, further to suffer one month simple imprisonment.

After depositing the amount of fine, Rs. 4,50,000/- (Rupees Four Lakhs Fifty thousand only) be distributed between the legal heirs of deceased and injured in ratio of 2: 1 after appeal period is over.

Accused Alister Anthony Pareira is further convicted for the offence punishable under Section 337 of IPC and sentenced to suffer simple imprisonment of 15 days.

Both the sentences to run concurrently.

Accused is entitled for set off.

The property which was found in the vehicle be returned to the accused Alister Anthony Pareira, after appeal period is over. “

8. At this stage itself, we may refer to certain findings recorded by the trial Court in the judgment impugned in the present appeals.

9. While granting benefit to the accused it noticed that the police had not collected evidence about consumption of alcohol by the accused. The Court then proceeded to record that the accused had consumed alcohol but it cannot be said that he was under the influence

of alcohol, so knowledge could not be attributed to the accused. The Court found that the accused was entitled to acquittal under section 304(II) IPC and the reason given by the trial Court for that purpose reads as under:

> "19. It is certain that case will not fall under Section 304 Part II of IPC, as knowledge cannot be gathered from the circumstances, as the alleged incident took place during late night hence no question of having knowledge of sleeping of persons on footpath do arise. So it is certain that offence under Section 304 Part II will not attract.
>
> 20. At the most, case will fall under Section 304 Part A IPC, so I am required to consider, whether the rash and negligent of driving of the car by the accused lead to the death of seven persons or not when defence admitted about accident."

The above findings were recorded by the Court after holding that the prosecution had proved that accused had consumed alcohol and the vehicle was being driven at a high speed and also on the statement of the accused that he lost control of the vehicle due to engine failure and was not able to control the vehicle. This fact itself proves rash and negligent driving by the accused and that the accident was not an act of God. The Court also noticed the report of the Motor Vehicle Inspector,

Rajendra Sawant (P.W.15) who stated that he had not noticed any damage to the brake or any mechanical defect at the time of inspection of the vehicle in question. After noticing certain other lacunae, the judgment under appeals was passed by the trial Court.

10. In our considered view, the learned trial Court ignored material evidence, did not refer to the exhibited documents and even the statement of witnesses. As such, the trial Court has fallen in error of law as well as in appreciation of evidence. It would be necessary for this court to examine the scope and meaning of the word `knowledge' appearing in Section 304 Part II of IPC as well as the attributability of knowledge to the accused and the advantage the prosecution may be entitled to on the basis of the admissions recorded in the statement under section 313 of IPC.

II. Ambit, scope and relevance of statement of an accused recorded under section 313 of the Code of Criminal Procedure.

11. Every provision is introduced in the statute book by the

Legislature with a specific purpose and object. The court is empowered under section 313 of the Code of Criminal Procedure, (hereinafter referred to as the “Code”) to examine the accused personally to explain any circumstance appearing in evidence against him. The statement could be recorded without previously warning the accused or with due notice to him. By making a statement, which is recorded without administering oath, or refusing to answer or even giving false answer to the questions, the accused does not render himself liable to punishment. Sub-section (4) of section 313 of the Code clearly postulates that the answers given by an accused may be taken into consideration in such inquiry or trial, and even can be used in other inquiry or trial against him for any other offence, which such answers may tend to show that the accused has committed. Thus, there is a clear object underlying this provision to provide the accused a fair opportunity of not only knowing the circumstance but also to give explanation, if he so chooses, in reply to such circumstances as they appear in the evidence against him. The intention is for furtherance of justice. The accused is given an opportunity to render explanation but with every right to remain silent. Such right is duly protected. The court is normally under an obligation to put the incriminating evidence against

the accused while recording such a statement.

12. The legislative intent behind this section appears to have twin objects, firstly, to provide an opportunity to the accused to explain the circumstances appearing against him and secondly for the court to have an opportunity to examine the accused to elicit explanation from the accused, which may be free from fear of being trapped for an embarrassing admission or statement. The proper methodology to be adopted by the court while recording statement of the accused under section 313 of the Code is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and inviting his explanation, provided the accused is willing to explain his conduct. Certainly the purpose is not either to question or cross-examine the accused in relation to the prosecution case. The accused has the option to remain silent, or to state the circumstances showing his innocence even by offering proper explanation or defence, which in his view would help him to achieve the paramount benefit of fair trial. It is not a mere formality but is a mandate of law. Where the Court has to comply with this requirement of

substantive law, there it is equally true that the Court is not expected to put to the accused each and every circumstance which is not on record or even inferences which are brought on record by the prosecution to establish the guilt of the accused. Reasonable approach has to be adopted to ensure that the object of the section is achieved and possibility of the principle being extended to impracticable and imaginary limits is avoided.

13. It is a settled position in law that while complying with the mandatory requirement of section 313, the court is not expected to put every material to the accused. It has to be confined to the circumstances appearing in the substantial evidence, which, in the opinion of the court, require explanation by the accused. In the case of *Bakhshish Singh Dhaliwal* vs *The State of Punjab*, AIR 1967 SC 752, where the court was concerned with the scope of section 342 of the Code, 1898 (equivalent to Section 313 of the present Code), it was held as under:

> "It was also submitted that these War Diaries were not put to the accused when he was examined under S.342 of the

> Code of Criminal Procedure and consequently, their use to the prejudice to the appellant to record findings against him was not justified. This submission is clearly based on a misapprehension of the scope of section 342 Cr.P.C. Under that provision, questions are put to an accused to enable him to explain any circumstance appearing in the evidence against him, and for that purpose, the accused is also to be questioned generally on the case, after the witnesses for the prosecution have been examined and before he is called on for his defence. These War Diaries were not circumstances appearing in evidence against the appellant. They were, in fact, evidence of circumstances which were put to the accused when he was examined under S 342 Cr.P.C. It was not at all necessary that each separate piece of evidence in support of a circumstance should be put to the accused and he should be questioned in respect of it under the section, and consequently, the High Court committed no irregularity at all in treating these War Diaries as part of the evidence against the appellant".

14. The object and scope of this salutary provision has received varied judicial interpretations. Of course, with the passage of time and development of law, it has been given a wider meaning and certain new dimensions in regard to the utilisation of the statement made by the accused under this provision in aid of the case of the prosecution, which otherwise is proved on its own merits. Every error or omission in complying with this section would not vitiate the trial. Inadequate examination of the accused, may cause prejudice to the accused or may

have material effect on the prosecution case, but it would essentially depend upon facts and circumstances of a given case. Some Courts have even taken a view that non compliance of the section in its strict construction, per se, is not sufficient to adversely affect the prosecution case and even an order of conviction can sustain, unless it is positively shown that such non-compliance was actually prejudicial to the interest of the accused. In a case where medical evidence was not put to the accused, but his attention was actually drawn to the fact that the evidence discloses that the victim died as a result of the injury caused to her by the accused, the court held that no prejudice was caused to the accused and thus neither the trial nor the conviction was vitiated **(***Dulal Nayak* vs *State of West Bengal***)** 1987 Criminal Law Journal 1561= 1987 (2) Crime 342. The the Supreme Court in the case of *Ajit Kumar Chowdhry* vs *State of Bihar***,** AIR 1972 SC 2058, held that if the accused denies the recovery then omission to ask further question in relation to the stolen property would not cause any prejudice to the accused as the basic fact already stands denied by the accused. The omission to put report of the Director, Central Food Laboratory, to the accused cannot vitiate the proceedings when it is shown that the accused was aware of the report, which was brought to his attention in his statement

(*Hariram* vs *State of Maharashtra* 1977 Criminal Law Journal 383). In substance there has to be substantial compliance with the statutory requirement while ensuring that the accused has suffered no prejudice as a result of any irregularity in the recording of statement under section 313 of the Code. Of course it must not be an illegality like not putting material or substantial piece of evidence forming the very basis of the charge which, apparently causes prejudice to the interest of the accused in receiving fair trial.

15. In the case of *Bibhuti Bhusan Das Gupta and anr.* vs. *State of West Bengal*, AIR 1969 SC 381, the Supreme Court explained the scheme of this provision as under:

> "... Sub-section (1) of section 342 consists of two parts. The first part gives a discretion to the court to question the accused at any stage of an inquiry or trial without previously warning him. Under the second part the court is required to question him generally on the case after the witnesses for the prosecution have been examined and before he is called for the defence. The second part is mandatory and imposes upon the court a duty to examine the accused at the close of the prosecution case in order to give him an opportunity to explain any circumstances appearing against him in the evidence and to say in his defence what he wants to say in his own words. He is not bound to answer or give false answers, but if he refuses to answer or gives false

answers, the consequences may be serious, for under sub-section (2) the court may draw such inference from the refusal or the false answer as it thinks fit. Under sub-section (3) the answers given by the accused may be taken into consideration in the inquiry or trial. His statement is material upon which the court may act, and which may prove his innocence, (see State of Maharashtra v Laxman Jairam, 1962 Supp 3 SCR 230= (AIR 1962 SC 1204). Under sub-section (4) no oath is administered to him. The reason is that when he is examined under section 342-A he is not a witness. Before section 342-A was enacted, he was not a competent witness for the defence. His statement under section 342 was intended to take the place of what he could say in his own way in the witness box. (see Hate Singh v State of Madhya Pradesh, Bharat, AIR 1953 SC 468, at p 470). Under section 342-A he is now a competent witness. But the provisions of section 342-A do not affect the value of his examination under s.342. Under sub-section (3) of S 342 his answers may be put in evidence for or against him in other inquiries or trials for other offences. For instance, if in a trial for murder he says that he concealed the dead body and did not kill the victim his statement may be used as evidence against him in a subsequent trial for an offence under section 201".

16. Still in the case of *Rattan Singh* vs *State of Himachal Pradesh*, AIR 1997 SC 768, the Supreme Court, while considering the effect of the statement under section 313, held as under:

> "Learned counsel for the appellant tried to make out much from the fact that no finger impression of Sheela Devi was found on the gun. We do not find any consequence on account of it in this case. In fact, appellant did not seriously dispute when the trial Judge put the question to him regarding that circumstance during his examination under section 313 of th Code of Criminal Procedure (question no. 25 related to the evidence that gun was produced by Sheela Devi and was taken into possession by the police. The answer was taken into possession by the police. The answer given by the appellant to that question was "I do not know"). Examination of the accused under section 313 of the Code is not a mere formality. Answers given by the accused to the questions put to him during such examination have a practical utility for Criminal Courts. Apart from affording an opportunity to the delinquent to explain incriminating circumstances against him, they would help the court in appreciating the entire evidence adduced in the court during trial. Ex PI – gun- admittedly belongs to the assailant. Therefore, when PW 10 said in court that she succeeded in snatching it from the assailant and she surrendered it to the police, we see no reason to disbelieve her, particularly in view of the evasive answer given by the appellant to the question concerned".

17. A Division Bench of this court in the case of *State of Maharashtra* vs. *Shivaji Anandrao Chede*, 2002(4) Mh L.J 201, held that the statement of the accused recorded during the trial under section 313 of the Code could be relied upon and taken into consideration in relation to the admission or confession of the accused made in such

statement, and observed as under:

> “26. The important point for consideration before us is, therefore, whether the statement recorded under section 313 of the Code can be rejected outrightly or whether the same would be taken into consideration. The legal conclusions drawn by the learned Sessions Judge in this regard, in our considered opinion, are grossly erroneous. In the case of Vijendrajit Ayodhya Prasad Goel vs State of Bombay (supra) which has been relied upon by the trial court,it was observed by the Supreme Court in para 13 as under:
>
> “ As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of accused's statement and excluded exculpatory statement does not seem to be correct. The statement under section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was incharge of the godown, he denied that the rectified spirit was found in the godown. He alleged that that rectified spirit was found outside it”.
>
> In the case of Nana Gangaram Dhore (supra), a Division Bench of this court, held that the court can act only on the prosecution evidence or the contention of accused or both and it cannot act upon the statement under section 342 of the Code of Criminal Procedure, 1898, which is partly inculpatory and partly exculpatory.

There was no evidence brought before the Court by the prosecution to show that the accused had caused any injury to the deceased with an axe and the accused in his statement made under section 342 of the Code had stated that he had snatched the axe from the hand of a prosecution witness to save the life of his brother, a co-accused, who was being attacked with a knife by the deceased and that he had delivered the fatal strokes with the axe in his right of private defence of person. It was under these circumstances this court held that the finding of use of the axe by accused could not be based upon his statement under section 342 of the Code which was not in the nature of confession and therefore, the conviction of the accused which was based upon such a statement was unsustainable.

The decision of the Supreme Court in the State of Maharashtra vs. Dr. D. R. Choudhary, (supra) as relied on by the trial Court does not lay down a legal proposition that the statement recorded under section 342 of the Code of 1898 (section 313 of the Code of 1973) is required to be rejected out rightly. The Apex Court stated:

"No doubt, under the Code of Criminal Procedure statement of an accused may be taken into consideration in an inquiry or trial but it is not strictly evidence in the case."

Similarly, in Makaradhwaja Bhoi's case (supra) it was held that merely on the basis of statement under section 313 of the Code it is difficult to secure conviction of the accused and it was for the prosecution to prove to hilt by reliable and dependable evidence that the accused was responsible for the death of deceased.

27. The evidentiary value to be attributed to the

statement made under section 313 of the Code has been more elaborately dealt with by the Apex Court the following cases.

In the case of Narayan Singh vs. State of Punjab, 1963 (3) SCR 678 = 1964 (1) Cri LJ 730 a Three Judge Bench of the Apex Court stated thus:-

"Under section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or explanation - if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused given by the accused may "be taken into consideration" at the enquiry or the trial. If the accused person in his examination under section 342 confesses to the commission of the offence charged against him the Court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirely."

Following the law laid down in Narayan Singh's case (supra) the Apex Court in State of

Maharashtra vs. Sukhdeo Singh (AIR 1992 SC 2100) further dealt with the question whether a statement recorded under section 313 of the Code can constitute the sole basis for conviction and recorded a finding that the answers given by the accused in response to his examination under section 313 of the Code of 1973 can be taken into consideration in such an inquiry or trial though such a statement strictly is not evidence and observed in paragraph 52 thus:-

"Even on the first principle we see no reason why the Court could not act on the admission or confession made by the accused in the course of the trial or in his statement recorded under section 313 of the Code...."

It is thus well established in law that admission or confession of accused in the statement under section 313 of the Code recorded in the course of trial can be acted upon and the Court can rely on these confessions to proceed to convict him. This proposition has been more elaborately set-out by a Three-Judge Bench of the Supreme Court in the case of State of U.P. vs. Lakhmi, AIR 1998 SC 1007. It would be apt to reproduce the relevant observations in para 7:-

"7. As a legal proposition we cannot agree with the High Court that statement of an accused recorded under section 313 of the Code does not deserve any value of utility if it contains inculpatory admissions. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the Court to be apprised of what the indicted persons has to say

about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes by flat denial or outright repudiation of those circumstances. In certain cases accused would offer some explanations to incriminating circumstances. In very rare instances accused may even admit or own incriminating circumstances adduced against him, perhaps for the purpose of adopting legally recognized defences. In all such cases the Court gets the advantage of knowing his version about those aspects and it helps the Court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy.

8. Sub-section (4) of section 313 of the Code contains necessary support to the legal position that answers given by the accused during such examination are intended to be considered by the Court. The words "may be taken into consideration in such enquiry or trial" in sub-section (4) would amount to a legislative guideline for the Court to give due weight to such answers, though it does not that such answers could be made the sole basis of any finding."

In the case of Mandhari vs. State of Chattisgarh, JT 2002 (4) SC 232, the appellant was convicted and sentenced to imprisonment for life under section 302 of the Indian Penal Code and same was confirmed by the High Court. The prosecution case was entirely based on the circumstantial evidence and the Supreme Court relied on the admissions made by the accused in statement under section 313 of the Code of Criminal Procedure regarding his presence in the house and rushing to

find that his wife was hanging by neck. His defence that his wife committed suicide was found to be false and it was not corroborated by the medical evidence. While confirming the findings of both the Courts below in respect of conviction and sentence the Apex Court in para 4 observed thus:-

"The most culpable circumstance found to have been proved and accepted by the Courts below against the accused is that he had himself made a false report of commission of suicide by his wife and admitted in his examination under section 313, Criminal Procedure Code that he was present in the house at the time of incident."

28.The language of section 313(4) of the Code of 1973 appears to have escaped the attention of the trial Court. The said sub-section reads thus:-

“(4) The answers given by the accused may be taken into consideration in any such inquiry or trial put in his evidence for or against him in any other into or trial for, any other offence which such answers may tend to show he has committed."

The first part of this provision namely; "the answers given by the accused may be taken into consideration in such inquiry or trial" has to be read independent of the remaining eventualities. This interpretation is buttressed by the decisions of the Supreme Court in the case (1) Narayan Singh (supra), (2) State of Maharashtra vs. Sukhdev Singh (supra) and (3) State of U.P. vs. Lakhmi (supra). On the basis of this settled position in law regarding admissions/confessions made by the accused in his statement under section 313 of the Code, we hold that the learned Sessions Judge fell

> in gross error in recording a finding that the presence of the accused in the night of 11.5.1983 in the drawing hall in the company of the deceased was not proved". (emphasis supplied)

18. We have dealt with the legal facets of the statement under section 313 of the Code primarily to deal with the arguments which have been advanced on behalf of the accused during the hearing that the provisions of Section 313 of the Code have not been complied with as the material evidence or circumstances, as shown by the prosecution, were not put to the accused, thus the finding of guilt and conviction are vitiated in law. While elaborating this submission, the learned counsel further argued that the panchanama, medical certificates, mechanical reports of vehicle inspector and allegations that the accused was drunk, were not put to the accused. It is then argued that the provisions of Section 313 of the Code are mandatory and their non-compliance would vitiate the trial. Reliance was placed on the decision in the case of *Malahavarao Bhagwandas Kharade* vs. *The State of Gujrat* reported in 1971 Criminal Law Journal 1626 and *Harijan Megha Jesha* vs *State of Gujrat*, AIR 1979 SC 1566, to contend that the report of the chemical analyser was not obtained as per

law.

19. As is evident from the facts on record, the accused was charged under section 304(II) and 338 of the Indian Penal Code. However, the trial court, vide the impugned judgment, convicted the accused for the offence punishable under section 304-A and 337 of Indian Penal Code. The case of the prosecution was that the accused was drunk and while driving his car rashly and negligently, he caused the accident which resulted in death of seven persons sleeping on the footpath and injuring eight others. Oral and documentary evidence was led by the prosecution to bring home guilt of the accused, which included oral testimonies of doctors, police officers,injured, photographer, panch, eye witnesses, and documentary evidence such as medical report, mechanical inspection report of vehicle, report of chemical analyser, photographs, panchanama and other evidence. The accused was subjected to statement under section 313 of the Code where various incriminating circumstances were put to him. There is no doubt that some evidence, including panchanama and report of the expert, was not put to the accused in that statement. In the statement of the accused under Section 313 of the Code, the main

case of the prosecution was put to the accused which in fact formed the basis of the charge. One very pertinent fact is that the accused himself admitted the accident and also opted to offer explanation, that failure of engine resulted in the accident. It will be useful to refer to the extracts from his statement recorded under section 313:-

. . . . . .

"Q.1. Have you heard and understood prosecution evidence?

Ans: Yes.

Q.2. What you want to say about the prosecution evidence that on 12.11.2006 between 3.45 a.m. to 4.00 a.m. there was an accident at Carter Road, Bandra(W), Mumbai where repairs of the road was going on?

Ans: It is true.

Q.3. What you want to say about the further evidence of prosecution that on above date, time and place seven persons were dead and eight were injured?

Ans: I do not know about it.

Q.4. What you want to say about the evidence of the prosecution that vehicle NO.MH-01-R-580 was involved in above accident on above date, time and place?

Ans: It is true.

....

.....

Q.7. What you want to say about the evidence of.

P.W.2, P.W.3, P.W.4, P.W.5, P.W.6, P.W.7, P.W.8, P.W.9, and P.W.10 who have stated that on above date and at particular time they were sleeping on footpath at Carter Road, Bandra(W),in temporary huts and there was an accident in which seven persons expired and they sustained injury due to said accident?

Ans: I do not know.

Q.8. What you want to say about the evidence of M.C. Mendosa and Basraj Mehtre who has stated that in their presence police have drawn the panchanama on 12.11.2006 and they have noticed that the Car NO.MH-01-R-580 was in a heavily damaged condition with dislodged right wheel behind the Car some blood was found on the earth also huts were found crush and accordingly police have drawn panchanama?

Ans: I do not know.

....

Q.12. What you want to say about his evidence further that he has seen the Car NO.MH-01-R-580 was coming in high speed from Khar Danda side on above date and time and rammed over the footpath crushed the labourers?

Ans: It is false

Q.13. What you want to say about his further evidence that you were arrested by the police on spot as driver of the vehicle on above, date time and place?

Ans: It is false.

....

Q.15. What you want to say about the evidence of Rajendra Sawant who has stated that he has checked vehicle No. MH-01-R-580 as per the request of the police and found no mechanical defect in the said car?

Ans: It is false.

....

Q.17. Do you want to lead defence evidence?

Ans: No.

Q.18. Do you want to add anything more?

Ans: On the way to my house there was failure of engine of my Car. The Car pulled right side and dashed the divider so I could not control the vehicle. I made attempt to stop the car by applying break but no purpose serve. I do not know thereafter till car stop"

20. Even if it is assumed that certain piece of evidence or circumstance appearing in the prosecution case was not put to the accused at the time of recording his statement under section 313 of the Code, this court then essentially must determine whether any prejudice has been caused to the accused for want of such compliance. First of all it has to be noticed with some significance that the accused admitted the accident and offered his explanation of failure of the car engine as his defence but then chose to lead no evidence. Once the statements of the witnesses, which included various exhibits that is statements of the doctors, postmortem report, medical reports as well as mechanical report of vehicle inspector, were put to the

accused it obviously mean that the accused was fully aware of the entire case of the prosecution and the evidence in support the said case. Specific questions were put to him in regard to the photographs,mechanical inspection, seized articles including liquor bottle, injury report and the death of deceased. Questions were also put to him in regard to the rash and negligent driving. However, chemical analyser' sreport Exhibits 48 and 49, which were exhibited during the statement of Somnath Baburao Phulsunder (P.W. 18), Investigating Officer of the case, were not put to him. It is obligatory on the part of the accused to show before the trial court and even before this court as to what prejudice he has suffered on account of such alleged non compliance. Firstly, the questions in regard to the factum of medical reports were specifically put to him which he chose to answer, the credibility of which we will shortly proceed to deal with. As far as C.A. Reports Exhibits 48 and 49 are concerned, they were not specifically put to the accused but that per se does not show any prejudice being caused to the accused because he admitted in his statement under section 313 of the Code that he was fully aware about the statements of witnesses and the exhibits on record. This at best could be termed as an irregularity but in no way would vitiate

the process of trial and resultant findings.

21. The learned Advocate General appearing for the State, while relying upon the judgment of the Supreme Court in the case of *Shivaji Sahabrao Bobade and anr.* vs. *State of Maharashtra*, (1973) 2 SCC 793, argued that the alleged omission has not been shown to have caused any prejudice to the accused and relied upon the following observations of the Court :

> "6. Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs thorough' the web of our law should not be stretched morbidly to embrace every hunch hesitancy and degree of doubt.
>
> In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set

the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analyzing the evidence and appraising the soundness of the contrary conclusions reached by the Courts below.

It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperial the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr. P. C., the omission has not been shown to have caused prejudice to the accused. In the present case, however, the High Court, though not the trial Court has relied upon the

> presence of blood on the pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this chemical finding particularly when we remember that his answer to the question regarding the human blood on the blade of the knife was 'I do not know'.

22. Even in the case of *Rattan Singh* , AIR 1997 SC 768, (supra) the Supreme Court noticed the effect of the answers like "I do not know" leading to the challenge to the case of the prosecution and its extent. Likewise, in the present case the accused admitted the accident, his car being involved in the accident which ran over large number of persons, but chose to deny the death of persons. It was for the accused to show what prejudice has been caused to his case or defence. He had a fair opportunity to meet what was against him on the record of the court. He chose not to avail of the same. The statement made by the accused has to be examined in its entirety. Where exculpability is found in the statement, then it is permissible to accept that part of the statement which accords with the evidence on record and can be taken into consideration. In the case of *Mohan Lal and anr.* vs *Ajit Singh and anr*, AIR 1978 SC 1183, the Supreme court held in para 22 as

under:

> "An attempt was made to argue that if the statement of the respondent is to be considered at all, it must be taken as a whole and that it is not permissible to act upon one portion of the statement which shows the presence of the respondent in the company of the deceased and leave out those portions which are exculpatory. It will be enough to say that the matter has been examined by this court in Nishi Kant Jha vs State of Bihar (1969) 2 SCR 1033: AIR 1969 SC 422) and as the evidence on the record disproves the exculpatory part of the respondent' s statement in the trial court, it is clearly permissible to accept that part of the statement which accords with the evidence on the record, and to act upon it".

23. Similar approach was adopted by the Supreme Court in the case of *State of U.P.* vs. *Lakhmi*, AIR 1998 SC 1007, and while taking note of the admission of the accused in that case in regard to the death of the deceased, as a case of homicide, emphasized the need and value of the statement made under section 313 of the Code and that such circumstance or incriminating statement could not be ignored on the ground that it was defence strategy. The observations of the Apex Court are already noted in paragraph 16 of this judgment.

24. In a recent judgment in the case of *Anthony D'Souza and ors.* vs *State of Karnataka*, AIR 2003 SC 258, while attaching importance

to the statement recorded under section 313, the court held as under:

> "... By now it is well established principle of law that in a case of circumstantial evidence where an accused offers false answer in his examination under section 313 against the established facts that can be counted as providing a missing link for completing the chain.
>
> In Swapan Patra vs State of West Bengal(1999) 9 SCC 242, this court said that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found not to be true then the same offers an additional link in the chain of circumstances to complete the chain. The same principle has been followed and reiterated in State of Maharashtra v Suresh, (2000) 1 SCC 471, where it has bee said that a false answer offered by the accused when his attention was drawn to a circumstance, renders that circumstance capable of inculpating him. This court further pointed out that in such a situation false answer can also be counted as providing missing link for completing the chain. The aforesaid principle has been again followed and reiterated in Kuldeep Singh and ors vs. State of Rajasthan. 2000(5) JT (SC) 161.
>
> In our view, therefore the chain of circumstances as recited above coupled with the law laid down by this court unerringly lead to one conclusion and that is the guilt of the accused."

25. The law has further expanded and the Courts have taken a view that apparent false answers to the incriminating circumstances posed under Section 313 of the Code can provide missing link in completing the chain of events. Applying this principle the Supreme

Court in the case of *Mani Kumar Thapa* vs. *State of Sikkim* 2002 (7) SCC 157 recorded that “statement of the appellant made under section 313 of the Code being palpably false and there being cogent evidence adduced by the prosecution to show that the appellant had given two other versions as to the incident of l2.2.1988, the court will have to proceed on the basis that the appellant has not explained the inculpatory circumstances established by the prosecution against him which would form an additional link in the chain of the circumstances".

26. It may be usefully noticed at this stage that it is also a settled principle of law that a statement of the accused under section 313 is not a substantive piece of evidence but is a version of the accused and explanation in relation to the incriminating material appearing on record. Even advantage to the accused from such statement has a very limited scope. To support the stand taken in the statement under Section 313, the accused may lead evidence but the said statement cannot be used by the accused for absence of any suggestion, which ought to have been made during the cross examination of the witness (*Devender Kumar Singhla* vs *Baldev*

Krishan Singla, 2005 (7) SCC 315). In the light of the above noticed judgments of the Supreme Court and clear judicial dictum, the observations of the Supreme Court made in *Sharad Birdhichand Sarda* vs *State of Maharashtra,* AIR 1984 SC 1622, can usefully be referred to, which dilutes the strict principles to certain extent. Of course, the basic principle does not get altered in its application that if any material piece of evidence is not put to the accused under Section 313 of the Code and it also results in prejudice to the accused then this may amount to denial of fair trial, having adverse effect on the case of the prosecution.

27. In the case of *State of M.P.* vs *Balu*, 2005(1) SCC 108, the Supreme Court held that contradictory statement of the accused within the ambit of section 313, even may result in rejection of both such versions. In that case the accused claimed animosity between the parties that is victim's family and his family and on the other hand, pleaded consent of the victim for having sex with him in the case of offences under Section 376 of IPC, which was a stand full of contradictions, exaggerations or embellishment.

28. In the present case, the accused is stated to have been arrested at the site of accident. He admits the accident, damage to the car and opens up defence of failure of engine, apparently in complete contradiction to Exhibit 42(mechanical inspection report). From the above narration of facts, it is clear that the accused was fully aware of the allegations and substance of prosecution case and in his wisdom answered the questions particularly in affirmative and largely denied it for want of knowledge. Even if there is no strict compliance of the provisions of section 313, yet the accused, in the facts and circumstances of the case, has not suffered any prejudice so as to vitiate the case of the prosecution. Even in the case of *Lalchand* vs *State,* AIR 1975 SC 128, where there was no strict compliance of the provisions of section 313 of the Code, the Supreme Court declined to interfere with the order of conviction.

29. Resultantly we have no hesitation in rejecting the arguments raised on behalf of the accused that there was no compliance of the provisions of section 313 of the Code and alleged non compliance of the same would vitiate the finding of guilt of the accused and his conviction. The salutary provision of section 313 of the Code have been

fairly, or at least substantially, complied with by the trial court, in the facts and circumstances of this case. The real purpose of putting the accused at notice of the incriminating circumstances and requiring him to offer explanation, if he so desires, has been fully satisfied in the present case. During the entire trial, copies of the documents were apparently supplied to the accused, even prior to the framing of the charge. After such charge was framed, all the witnesses were examined in the presence of the accused and even limited questions regarding incriminating material put by the court to the accused in his statement under Section 313 of the Code shows that the entire prosecution case along with different exhibits was put to the accused. He in fact did not deny the suggestions that the witnesses had been examined in his presence and he was aware about the contents of their statements. All this essentially would lead to only one conclusion that the contention raised on behalf of the accused in this regard deserves to be rejected. While rejecting this contention we would also observe that the admission or confession of the accused in his statement under section 313 of the Code, in so far as it provides support or even links to, or aids the case of the prosecution proved on record, can also be looked into by the

court in arriving at its final conclusion. It will be more so when explanation in the form of answers given by the accused under Section 313 of the Code are apparently untrue and also when no cross examination of the crucial prosecution witnesses was conducted on this line.

III. The charge, its essential ingredients and effect thereof, knowledge, etc.:

30. On 12th March 2007 the accused was charged under section 304 (II) of IPC for causing death of seven persons who were sleeping on the footpath at Carter Road, Bandra (West) Mumbai by rash and negligent driving with the knowledge that they were sleeping on the footpath. He was further charged under section 338 of IPC for driving the vehicle rashly and in a negligent manner and thereby causing grievous hurt to 8 persons, who were sleeping on the footpath. On these two charges, the accused was put to trial and the prosecution had led its evidence to prove the said two charges. It needs to be mentioned that the FIR being FIR No.436 of 2006 dated 12th November 2006 was registered under section 304 (II), 279, 337, 338, 336, and

427 IPC read with section 185 of the Motor Vehicles Act, read with section 66(1)(b) of the Bombay Prohibition Act. However, the charge was framed only for two offences viz u/s 304(II) and 338 and neither the accused nor the State questioned the correctness of this order. The State has not raised any challenge on this ground even in the present appeals.

31. Under section 304(II), whoever commits culpable homicide not amounting to murder can be punished with imprisonment of either description for a term which may extend to 10 years or with fine or with both, if the act is done with knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury, as is likely to cause death. A bare reading of this provision shows that there are three essential ingredients of the offence punishable under section 304(II); (a) accused must commit a culpable homicide not amounting to murder, (b) the act is done with knowledge that it is likely to cause death and (c)but without any intention to cause death.

32. Section 299 of IPC defines culpable homicide as whoever causes death by doing an act with the intention of causing death or with

an intention of causing such bodily injury, as is likely to cause death or with the knowledge that it is likely by such act to cause death. Illustration (b) to section 299 indicates the kind of cases, which will fall within the ambit of section 299. A culpable homicide which is not a murder within the contemplation of the provisions of section 300 can alone fall within the scope of section 304(II). `Knowledge' and `intention' are the deciphering and distinguishing factors. If an act is done with knowledge but without intention, then it would fall under section 304(II), but if there is intention for committing offence of culpable homicide, it would take it beyond the purview of this provision. The provision of section 304 falls into two different classes; one where offence is committed with intention of causing death or bodily injury as is likely to cause death providing life imprisonment or imprisonment for a term which may extend to 10 years with fine. The other part is relatable to the act which is done with knowledge that it is likely to cause death but where the element of intention is absent. There it prescribes different punishment of lesser gravity. The act done with knowledge of the end result being of the kind where the doer had reason to believe that the “actus reus” would result into an offence, the knowledge would be attributable to the offender. The court may, in a given set of facts, attribute to the intoxicated man

same knowledge as if he was quite sober. This may not be quite true so far as the intention is concerned. `Knowledge' is an expression of wide connotation and is capable of varied interpretation in the context of the facts and circumstances of a given case. While doing an act, knowledge of consequence would be attributable to the accused, if it falls within the normal behaviour of the person of common prudence. It is difficult to state with certainty any essential constituent of `knowledge' but this aspect can safely be examined in the light of various judicial pronouncements and settled canons of criminal jurisprudence.

33. Let us examine the expression `knowledge' in different contexts as it is a most pertinent expression appearing in Section 304 (II).

34. Law Lexicon by *P. Ramanatha Aiyar*, 1997 edition explains the word `knowledge' as certain perception of truth, act or state of knowing that which is or may be known, acquaintance with things ascertainable, reasonable conviction, anything which may be subject of human instructions. While drawing distinction between knowledge, actual knowledge and knowledge relatable to different expressions, it

describes as under:

> “1) ` Knowledge' is confined to the personal knowledge of the person who has to deliver the account, including the information contained in all the documents which he possesses or has custody of, or to which he is entitled, but no further....
>
> 2) `Knowledge' and ` actual knowledge' have sometimes been held to be synonymous. The `knowledge' as used in a contract by which a fidelity and causality company bound itself to make good (to a ban) such pecuniary loss as the latter might sustain by reason of the fraud or dishonesty of a named employee in connection with his duties, providing that the contract would be void if the bank continued in its service an employee of whose untrustworthiness they had knowledge, means actual knowledge and not constructive.
>
> 3) Knowledge and Belief-` knowledge' is nothing more than men's firm belief, and is distinguished from ` belief' in that the latter includes things which do not make a very deep impression on the memory., The difference is ordinarily merely in degree.
>
> 4) The meaning of the word `belief' and `knowledge', as defined by lexicographers, will show that there is a distinct and well defined difference between them. `Believe' is defined by Webster to mean to exercise trust or confidence, and by the Century Dictionary, to exercise belief in, to be perused upon evidence, arguments, and deductions, or by other circumstances other than personal knowledge. `Knowledge' , according to Webster, is the act or state of knowing , clear perception of fact, that which is or may be known. According to the Century Dictionary it means acquaintance with things ascertained or ascertainable, specific information.

> 5) Knowledge of the law- `The knowledge of the law with which every man is charged includes a knowledge of the constituent facts which make the law. That the Legislature enacted a certain law is a fact, but a knowledge of the law imputed to every man comprises a knowledge of that fact. That a certain law is valid or void is another fact, but every man is presumed to know whether it is valid or void, else he could not know the law".(Words and Phrases).

35. In a given circumstance `knowledge' may be construed quite differently from the expression `knowing'. Knowledge is of a lesser degree while `knowing' is of a definite connotation and it must be established that the offender knew about it. Knowledge has also been explained in the Judicial Dictionary by *K.J. Aiyar*' as under:

> "Knowledge- A clear and certain perception of that which exists.
>
> -Knowledge includes either personal knowledge or knowledge derived from documents. No restriction can be read in the word `knowledge' that it ought to be derived by ocular seeing of the event. Magistrate can take cognizance of the offence of his own knowledge derived from the police papers, FIR, and the final report under section 169 (Raju alias Rajendra Singh vs State of Rajasthan, 1979 Cr L J (Raj) 300: 1979 Raj L.W. 67 : 1979 Raj Cri C 258: 1979 WLN 144)

36. One of the meanings given in the *Oxford Dictionary* of

the word `knowledge' is:

> "The fact of knowing a thing, state, etc or (in general sense person, acquaintance, familiarity gained by experience"). Acquaintance with a fact, perception, or certain information of a fact or matter, state of being aware or informed, consciousness (of anything). The object is usually a proposition expressed or implied, e.g., the knowledge that a person is poor, knowledge of his poverty.."

37. The *Black*' *sLaw Dictionary*, 6th Edition explains the word ` knowledge' in different contexts and it would be helpful to have a glance at them with an object to find most appropriate meaning relatable to the requirements of Section 304(II) of IPC.:

> "Knowledge. Acquaintance with fact or truth- People v Henry, 23 Cal App 2d 155, 72, p 2d 915,921.
>
> It has also been defined as act or state of knowing or understanding, Writters v U S 70 App DC 316, 108, F 2d 837, 840 actual knowledge, notice or information, New York Underwriters Ins Co. v Cental Union Bank of South Carolina, C.C.A.S.C.65 F 2d 738, 739 assurance of fact or proposition fonded on perception by senses, or intuition, clear perception of that which exists, or of truth, fact or duty, firm belief; Writters v U S 70 App DC 316, 106, F 2d 837, 840, guilty knowledge, Goldsworthy v Anderson, 92 Colo 446, 21, P 24 718. information of fact, Green v Stewart, 106 Cal App 518, 289 P 940 944, means of mental impression, Howard v Whittaker, 250 Ky

836, 64, S W 2d 173 miscellaneous information and circumstances which engender belief to moral certainty or induce state of mind that one considers that he knows, Wise v Curdes 219 Ind 606, 40, NE 2d 122, 128, notice or knowledge sufficient to exercise attention and put person on guard and call for inquiry, Iberville Land Co v Amerada Petroleum Corporation, C.C.A.La 141 F 2d 384, 389, personal cognisance or knowledge or means of knowledge, The Chickle DC Pa 54 F Supp 19,20, state of being or having become aware of fact or truth. Howard v Whittaker, 250 Ky 836 64 SW 2d 173.

When knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Knowledge consists in the perception of the truth of affirmative or negative propositions, while `belief' admits of all degrees, from the slightest suspicion to the fullest assurance. The difference between them is ordinarily merely in the degree, to be judged of by the court, when addressed to the court, by the jury, when addressed to the jury".

38. The meaning of word `knowledge', as given in The *New Oxford Dictionary of English* can also be referred for understanding the expression in common parlance:

"Knowledge - facts, information and skills acquired by a person through experience or education, the theoretical or practical understanding of a subject, a thirst for knowledge her considerable knowledge of antique,

> What is known in a particular field or in total, facts and information, the transmission of knowledge; "

39. `Knowledge' is again distinguishable from `reason to believe'. The term ' knowledge' contains higher degree while the term 'reason to believe' is a matter of lesser degree. In the first, the person has direct appeal to his sense, while in the latter, there is sufficient cause to believe. While determining knowledge in relation to an event, the conduct of the person prior to and at the time of the event is of relevant consideration. *Actus reus* requires that to constitute a crime there must be a result brought about by human conduct, to physical event, which law prohibits. When an individual pursues or follows a line of conduct, he is expected to produce certain results. Final events or results may be the outcome of different events or it may be the result of a single act. If the end result is prohibited in law and if knowledge would have to be construed in the events of that case in relation to the evidence on record, the onus obviously is on the prosecution to prove the chain of acts even to attribute knowledge to the accused. The concept of ` knowledge' has to be understood and applied to the facts of a given case in complete contra-distinction to the words ` information' or ` reasons to believe'. There may be difference of degree but that

difference has to be kept in mind, as that alone is the paramount consideration even at the stage of framing charge whether under sections 300, 302 or 304 and for that matter, 304 (I) or (II) of the IPC (See Commentary by K.D. Gaur, 3rd edition on IPC and Commentary on IPC by *Ratanlal Dhirajlal*, 31st enlarged edition of 2006).

40. The Supreme Court and various High Courts have also explained the word `knowledge'. To establish knowledge as an ingredient of criminal offence, there has to be an affirmative or circumstantial evidence to bring home to the accused that he had knowledge of his acts. What a person of normal and ordinary prudence foresee by utilization of his sense directly, would be knowledge. In the case of *Jairaj* vs *State of Tamil Nadu*, AIR 1976 SC 1519, the Supreme Court observed that knowledge of the likelihood of the death of the person is contemplated in law. Under section 304(II), if the result of the criminal act is death of the victim and if each of the assailants possesses the knowledge that death is the likely consequence of criminal act, then there is no reason why section 34 should not be read with second part of section 304 to make each of such persons

individually liable. (*Afrahim Sheikh and ors.* vs *State of West Bengal* (1964) 6 SCR 172).

41. It will be useful to refer to the facts of a case titled State of Gujarat vs Haidarali Kalubhai, 1976 (1) SCC 889, which had not been argued during the course of the hearing of this case. In that case the accused was charged for an offence under section 304 II on the allegation that he had caused death of a police officer lying on a cot from where he was thrown out. According to the accused and as per his statement under section 313 of the Code, when he was reversing the vehicle, other truck was standing and while making his way to the narrow passage, the accelerator got stuck and the truck then went in high speed resulting in the accident. When the driver heard the noise, the cleaner of the truck told him that he had stuck the truck against a cot and people were injured. That obviously was a case of negligent driving simpliciter, as is clear from the attendant circumstances and no knowledge could be attributable to the accused in the facts and circumstances of the case that his reversing the vehicle could cause fatal accident, unlike the facts of the present case where direct evidence as well as attendant circumstances clearly demonstrate that safely an

inference of knowledge could be drawn.

42. Another important aspect which has to be examined is that all persons are deemed to be in the knowledge of law. What is prohibited in law and what is an offence in law, are matters of public knowledge. Ignorance of law is not a valid defence when the person is committing an act or omission, which would result in an act prohibited in law. Therefore, the offender cannot take the plea of ignorance in that regard. (*Joti Prasad* vs *State of Haryana,* AIR 1993 SC 1167, and *State of Maharashtra* vs *Mayer Hans George, AIR 1965 SC 722.* It will be useful also to notice the judgment of the Supreme Court in the case of *Joti Prasad* vs *State of Haryana*, AIR 1993 SC 1167, where counterfeit court fee stamps were recovered from the possession of the accused, a licenced stamp vendor. The accused alleged that he had purchased the stamps from the treasury, but did not produce register of such purchase. The accused also did not make any effort to summon the record of the treasury. The court held that it would be proper to infer that the accused has knowledge or reason to believe that the stamps were counterfeit and observed as under:

“Under the Indian Penal law, guilt in respect of almost all the offences is fastened either on the ground of `intention' or `knowledge' or `reason to believe'. We are now concerned with the expressions `knowledge' and `reason to believe' . `Knowledge' is an awareness on the part of the person concerned indicating his state of mind. `Reason to believe' is another facet of the state of mind. `Reason to believe' is not the same thing as `suspicion' or `doubt' and mere seeing also cannot be equated to believing, `Reason to believe' is a higher level of state of mind. Likewise `knowledge' will be slightly on higher plane than `reason to believe'. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26. IPC explains the meaning of the words `reason to believe' thus:

26 “Reason to believe” - a person is said to have “ reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise”

In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. “ knowledge” and “reason to believe” have to be deduced from various circumstances in the case. In the context of the circumstances obtaining in the instant case namely the the appellant admittedly was a licenced stamp vendor and he was found in possession of counterfeit stamps, the

> explanation of accused also becomes relevant and important in assessing and appreciation whether he had such knowledge or reason to believe that the stamps were counterfeited. Admittedly he used to purchase stamps from the treasury and all such transactions are duly recorded in the official registers. There is absolutely no material whatsoever to show that the counterfeit stamps were in fact purchased by him from the treasury. A bare allegation by way of an explanation by the accused- appellant that he purchased all the stamps including the counterfeit ones from the treasury appears on the face of it to be false, as he has neither produced registers maintained by him nor did he make even an effort to summon the treasury records. There is no material whatsoever even to probabilise such a plea. In these circumstances the only inference that can be drawn is that he had "knowledge" and "reason to believe" that the stamps which he had in his possession and which he was selling or offering to sell, were counterfeit ones. These ingredients of the two provisions of law are fully established. Therefore the convictions are correct. The offence also is a serious one and the sentence awarded is not excessive. The appeal is therefore dismissed. "

43. The concept of rash and negligent driving simpliciter can be attributable where there are no other attendant circumstances of culpable factors indicating additional conduct, act, omission or commission on the part of the offender, pre and post accident. 'Knowledge' is a concept which would get attracted in the above circumstances as the case would fall beyond the known canons of rash and negligent driving simpliciter. Getting drunk and under the influence

of liquor using a big stick or other weapon for giving blow on the head of a person resulting in death, would obviously be an act done with knowledge that the act would or is likely to cause death. Merely because an automotive car or scooter is involved in the same process would not by itself take the offence outside the scope of section 304 (II) of IPC. The court would have to examine this in the light of the evidence led by the prosecution, defence, if any, the links provided by the accused himself in his statement under section 313 and attendant proven circumstances of the case.

44. A very important principle of law has been enunciated by the Supreme Court in the case of *Jayprakash* vs *State (Delhi Administration)*, 1991(2) SCC 32. The court accepted that intention and knowledge both are factors which have to be gathered from the facts and circumstances of each case and there cannot be a yardstick uniformly provided for application of such principle. The Supreme Court in that case was dealing with an offence punishable under section 302 for committing offence under section 300 clause thirdly and while holding that the said act amounts to culpable homicide, and following the dictum of the court, stated distinguishably the principle of law as under:

“The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here not there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question”.

The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances.

It can thus be seen that the 'knowledge' as contrasted with 'intention' signify a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or

> inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end."

45. Section 304 Part-II requires that if an act is done with knowledge that it is likely to cause death, it is punishable under that provision. Culpable homicide not amounting to murder is the essential ingredient of a charge under section 304(II). Under section 299, culpable homicide is causing death by doing an `act', with intention of causing death as well as knowledge that it is likely to cause death. The entire emphasis is on the expression `act' and `knowledge' . Knowledge', we have already dealt with at some length with its effect and relevance to the present case. We shall shortly proceed to discuss `act' Even in its legal sense or even in common parlance 'act' means to take action or do something or to do anything in furtherance or even to fulfill function. Thus the expression `act' does not admit of any limitation, it can be anything and everything by any means. Offensive act may result from a blow, use of knife, gun and even can be by means of a automotive machine (motor vehicles etc.). It was nowhere contemplated by the Legislature that a particular method has to be used for constituting an act, which, if results

in death of a person, would invite rigours of the section. If the offender has knowledge that his acts in normal course are likely to end in commission of result which is prohibited in law, the knowledge would be attributable to him, provided there is direct and/or circumstantial evidence in that regard. Comprehension of a reasonable person with ordinary prudence in regard to the result of his acts or omission, is a relevant consideration for a court to arrive at a conclusion, where the offender had knowledge of such events or extent thereof. The Supreme Court in the case of *Jayprakash,* 1991 (2) SCC 32 (supra) clearly stated that the knowledge of the accused is subject of invisible state of mind and their existence has to be gathered from the circumstances, such as weapon, force of the attack and other surrounding circumstances. `Knowledge' being of lesser degree has to depend considerably on attendant circumstances and awareness of a common man in relation to the acts and deeds immediately preceding or at the time of occurrence of the offence. In the present case, the court has to examine whether a person in drunken condition, rashly and negligently chooses to drive in an overcrowded car, was fully aware that (a) poor persons sleep on the footpath of Mumbai (b) it is prohibited in law to drive a vehicle in drunken condition (under influence of liquor) and (c) it is also prohibited

in law to drive a vehicle beyond permissible speed limit. Further it is to be noticed that a liquor bottle was recovered from the car of the accused and the medical evidence showed that the accused was having 0.112% w/v liquor (ethyl alcohol) in his blood (Exhibit 49). The attendant circumstances immediately preceding the accident have been stated in the FIR (Exhibit-13) that the vehicle was driven with high speed and the occupants of the car were making noise. This ex-facie cannot be said to be an act of simpliciter rash and negligent driving. The accused is young and obviously affluent person who owns a luxury car and can pay the fine of Rs.5 lacs as imposed by the trial court within a very short duration of pronouncement of the order of conviction. He is a person who is expected to be having knowledge of law, life in Mumbai and publicly known fact that poor labourers sleep on footpaths of Mumbai. All this imposes a legal obligation upon a person to drive the vehicle carefully at late hours of night and in any case not under the influence of liquor in a drunken condition or rashly. Possession and consumption of liquor is prohibited under section 66 of the Bombay Prohibition Act, 1949. Consumption or use of intoxicant while driving is punishable and driving rashly and negligently resulting in fatal accidents is an offence, are the matters of which the accused would be deemed

to have knowledge. Besides this, accused was fully familiar with the area being the resident of Carter Road as indicated in the plea of the accused (Exhibit-7) and his statement made under Section 313 of the Code. As such, it could be safely recorded that he was aware of the persons (labourers) sleeping on the footpath on that road. On facts it can hardly be believed that a person in drunken condition or under the influence of liquor, having 0.112% v/v alcohol in his blood driving a vehicle rashly and negligently with high speed and with high tape recorder sound, would not have knowledge that there is every likelihood of his meeting with an accident resulting in death or injury to others, particularly those sleeping on the footpaths. The knowledge of such facts can neither be far away from reality and, in any case, would squarely fall within the term of “knowledge” appearing in section 304(II). Keeping in mind the facts and circumstances of the present case the events resulting from such acts, omission and offences would be within the knowledge of the offender.

46. “Actual knowledge” stricto senso may not be the sine qua non of the ingredients of section 304(II) of IPC. 'Knowledge' ,as understood in its common parlance would have to be gathered from the

evidence on record - substantive or circumstantial, and the attendant circumstances thereto. While objectively analysing the evidence on record for gathering knowledge contemplated under this provisions, the court, inter alia, may have to examine the following aspects to which knowledge may relate to:-

(a) The evidence and attendant circumstances in relation to an act or omission committed by the actor /offender prior to the actual occurrence of the incident;

(b) Whether the actor/offender could reasonably perceive the consequences of his acts, misdeeds or omission, examined from the point of view of `normal human conduct of a person of common prudence'; and

c) Such offensive conduct actually resulted in an offence or an act prohibited by law and on a cumulative appreciation of evidence, the act done resulted in death or a bodily injury, which is likely to cause death, of course without any intention to cause death.

47. Knowledge is not a term to be construed in abstract. It must be given objective meaning keeping in view the facts and circumstances of a given case. Simplest test would be whether as a norm of normal

behaviour the person can perceive by his senses the consequences of his acts, omissions or commission; where such human conduct brings results which are criminal offences, it would satisfy *actus reus*. Where a physical event which is prohibited by law is even preceded by offences, which is known to the offender, the knowledge can be gathered more affirmatively, as ultimately it is a question of fact dependent upon the evidence on record and the attendant circumstances.

IV Discussion on facts and mixed questions of facts and law:

48. Let us examine the prosecution evidence afresh as certain material links have been overlooked by the trial court and at the same time the trial court also fell in error of law in not exhibiting the proved documents. As already noticed the case begins by the statement of Panchnandan Pareamalai (P.W.2) who is a material witness. In his examination-in-chief he has stated that he was a labour contractor and temporary hutments have been constructed near the Railway Colony and persons were sleeping on the footpath. Upon hearing the commotion he had seen smoke coming out of a vehicle which ran over the footpath and six persons died on the spot and eight persons

sustained injuries. This witness in his examination in chief refers to his complaint which is Exhibit-13. In Exh. 13 he states that he was working with New India Construction Company and 9 labourers were working under him. Temporary hutments were constructed near Railway Colony. The labourers were sleeping on the footpath. At about 3.30 a.m. on 12th November, 2006, he saw some persons driving a car with tape on and making noises. The car went at high speed and met with an accident on Carter Road while going towards Bandra Side. The driver swerved the car suddenly and rushed towards the left side of the road and ran over the people sleeping on the footpath and also dashed against the houses. The car crushed seven persons and inured eight. He raised hue and cry and reported the matter to the police. He saw that the front wheel of the car was damaged and even number plate of the car was broken. One girl and two boys ran away from the spot and in the meanwhile a police van came. He informed the police of the accident whereafter the police van removed three persons who were still sitting in the car of the accused. The person who was driving the car was asked his name, etc. by the police and he gave his name as Alister Anthony Pereira. The other persons were drunk and they were taken into custody by the police. After some time, the police vehicles

came there and took injured to the hospital and he accompanied those persons. The doctor upon their examination declared six dead. One was admitted in the Intensive Care Unit and some were admitted for treatment at the Hospital while others were discharged after first aid. According to this witness, his statement was recorded on the computer and was duly explained to him in Hindi and Marathi which he found to be correct and signed the same. It is interesting to note that he was cross examined at some length by the learned counsel for the accused. He completely denied the suggestion that the road was to some extent blocked for construction purpose. He clearly stated that the construction was going on on the footpath. He also denied the suggestion that he had filed false complaint to the police. He further denied the suggestion that he was not present at the site when the accident took place. Nothing material came out of the cross examination of this witness. In fact, even the case of the defence was not put to this witness in the cross examination. This witness had not stated that the wheel of the vehicle had come out of the body of the car. No question with regard to the defect in the engine of the vehicle, proper driving by the driver of the vehicle or even the speed of the vehicle was put to this witness in the cross examination. Obviously the defence failed to put its

own case to this witness and rendered no explanation so as to create doubt or the element of falsity in the statement of Panchnandan (P.W.2) as well as in his complaint Exh 13.

49. Exhibit 28 is the spot panchnama which was prepared by the Investigating Officer in presence panchas P.W. 11 J.C. Cello Mendoza and P.W. 16 Basaraj. In the panchnama location of the place of occurrence was given and it was found that spot of accident is towards South at a distance of about 110 ft from the main gate of Railway Officers' Colony. On the footpath, between the main entrance of Railway quarters and the main entrance of Varun Cooperative Housing Society, temporary sheds have been set up and at the place of accident a grey colour Corolla vehicle of Toyota Company was standing facing towards the sea side. Front wheel of the car was broken and mudguard was pressed. From the car, a lady's left foot slipper, cigarette packet, glass and bottle having Bacarddi Superior Label were recovered. Items recovered were sealed in a khaki colour paper bag and the items were taken into custody by the police. Photographer took photographs from various positions at the place of accident. P.Ws. 11 and 16 while appearing in court fully supported the case of the prosecution and

nothing material favouring the accused came out in their cross examination. They stated that they were called by the police once and they had signed the papers describing as to what they had seen. P.W. 16 Basaraj has stated that he was working with Ajanta Electrical Works situated at Khar and his duty hours were from 9 a.m. to 6 p.m. and that he was called by the police and he acted as recovery panch on that day. The above evidence clearly demonstrates that the accused had the knowledge of the above facts which knowledge is established even by the high probability of disastrous results of his actions and omissions.

50. Pravin Sajjan Mohite (P.W.12) is the photographer. According to him he was called from his house at about 3.30 a.m. on 12.11.2006. He was required to take photographs of the place of accident. He reached the spot and took photographs of the site as per the directions of the Investigating Officer. He had taken 33 photographs including the photos which he had taken in the hospital and he handed over the same to the Investigating Officer. He further said that " the photos now shown to me were developed from the negatives which is before the court which were taken by me. The negatives are at Exh.30". In the cross examination he was asked the question to which he replied that

he cannot say whether the seven photos tally with the copies of the photos on which prosecution was relying. The photos which were filed with the charge sheet were not taken by this witness.

51. Nimbaji Samadhan Ingle (P.W.13) supported the case of the prosecution. According to his version he was on duty from 8 p.m. to 8 a.m. at the company's work which was in progress at Carter Road, Bandra (West). During his duty hours he used to take rounds and on 12.11.2006 at about 4 a.m. he had seen the accident . According to him the vehicle was at a high speed and it rammed over the pavement and crushed the labourers, who were sleeping there. Further, according to him nearly 15 persons were sleeping on the pavement. After the accident police rushed to the spot and caught the driver. In his cross examination he specifically stated that his company's trucks were not parked at the construction site. The material was lying at a distance of 20 feet away from the spot of the accident.

52. Rajendra Nilkanth Sawant (P.W.15) claims to have been summoned by the control room on 13.11.2006 to check the vehicle involved in the accident. The vehicle was in front of the police station,

Khar. He checked the vehicle. According to him, the steering wheel of the vehicle was intact, brake lever was operative and gear lever was operative, the engine was found dislodged from the foundation. There was no air in the front wheel of the vehicle. He proved the report Exhibit-42. In his cross examination he stated that there were scratch marks on the right side of the vehicle and he could not give the cause of accident. Along with the report he had annexed 7 photos as part of Exhibit-42. It may be noticed that according to this witness the right front wheel rim was damaged. None of these photographs annexed as part of report Exhibit-42 indicate or show dislodging of the engine etc.

53. In the backdrop of the above eye witness versions and version of experts, now we may proceed to discuss the medical evidence available on record. Dr.Nitin Vishnu Barve (P.W. 1) stated that he was attached to Bhabha Hospital, Bandra and was working as Casualty Officer, when Khar Police referred 14 injured persons to him. He examined all those persons. He did not know the names of all the persons. One person had CLW over left temporal parietal region having size of 5 x 3 cm with scalp deep with profuse bleeding. Then he had referred some injured to

orthopedic and emergency Medical Registrar. He also examined other persons who were injured. One patient named Ramchandra had pain and tenderness over the skull with nosal bleeding and blunt trauma to the abdomen. Even Jagan Kumar sustained injuries. Besides other injuries he also found abrasion over right and left knee joint with pain and tenderness over the left chest and left shoulder of this patient. Minor abrasion over right scapular region of 0.5 x 0.5 cms with bleeding surfaces was also noticed. Exhibit 40, the medical certificate issued for Sigamani Shaukarpani shows that the medical officer arrived at the conclusion that there was suspected fracture for which the injured was referred to orthopedic. In his examination in chief he also stated *"I have taken blood of the accused as he was found in a drunken condition. The certificate was issued by Dr. Sharad Ruia, it bears his signature...."*. Opportunity to cross examine this witness was given to the accused and except for asking the doctor formal questions in regard to the register maintained, nothing material was put to him. No suggestion was made to this witness that the accused was not drunk. The doctor clearly stated that he was stating on the basis of the examination of the injured and the record brought by him in court.

54. Dr Sharad Maniklal Ruia (P.W.14) also stated that he was on duty as medical officer on 12.11.2006 in the casualty department. After cross checking the register he issued medical certificates. The certificates were issued in accordance with the register. The contents of certificates Exhibits - 33 to 40 describing injuries caused to the injured persons were correct and as per the register. He denied the only suggestion put to him that he was deposing falsely and the register is false. It can be noticed at this stage itself that the postmortem on the deceased was performed and the report of the postmortem is at Exhibit-18 collectively. These postmortem reports relate to seven persons viz. (i) Timanna Londa Aashappa-age 40 years, (ii) Smt. Ajama Bagappa Motar Mallappa-age 35 years, (iii) Smt. Lachchamma Malla Raju-age 25 years, (iv) Smt. Mariamma Timanna-age 35 years,(v) Devbagappa Motar Mallappa-age 7 years, (vi) Kum. Kavita Timanna-age 5 years and (vii) Raju Timanna-age 35 years. These are the persons who died as a direct result of the accident. The cause of death was head injury and shock due to trauma.

55. Meenakshi Anant Gonda Patil is the PSI attached to the Khar Police Station and she was SHO on the night of 11.11.2006. After

receiving message from the mobile van she went to the place of the accident at Carter Road and she noticed that labourers sleeping on the footpath were crushed by the vehicle MH O1 R-580. The injured were shifted to the hospital and a case under the above referred provisions was registered. She confirmed that she had recorded the complaint of the complainant vide Exhibit-13. She also prepared panchnama Exhibit-28. She had drawn a sketch of the spot, arrested the accused, got him examined by the doctor, collected blood and urine samples, recorded statements of the injured persons and further investigation was carried out by P.I. Somnath Baburam Phulsunder. She admits that the construction machines, trucks and cement bags were on the spot.

56. Somnath Baburao Phulsundar (P.W. 18) is the police officer who conducted the investigation thereafter. He prepared the panchnama for seizing the chappal etc. He had forwarded the blood sample to the Chemical Analyser vide covering letter Exhibit-47. He recorded the statement of two persons namely Abhay Jagannath Nalawade and Praveen Sajjan Mohite. Thereafter he recorded the

statements of other witnesses. He collected medical certificates and postmortem report from the doctor of Bhabha hospital after 8.12.2006 which were exhibited on record. In his cross examination he admits that there is slight curve at the spot to the road. He categorically denies the suggestion and states "*It is not true to say that the work of the footpath and divider was going at particular spot*". He stated that the office of the Additional Commissioner of Police is about 2 minutes walking distance from the spot which in no way can demolish the case of the prosecution. In the panchnama Exhibit-28 it is recorded that the accident spot is towards south side at about 110 feet distance from the main gate of the Railway Officers Quarters. From the spot of accident towards south at a distance of 50 ft there is main entrance of Varun Co-op. Housing Society. He has also stated the details of damage caused to the car. The measurements which have been taken of the site of accident in the presence of panchas gives the following details:

"1) From the accident spot to the south side electric pole no HAFO1/004 the distance is 50 ft.
2) From the accident spot to the north side electric pole no. HAFO1/035 on the footpath the distance is 37 ft.
3) From the accident spot (edge of the footpath) to road divider the distance is 32 ft.
4) From the accident spot on the north side footpath at a distance of 37 ft towards the sky the electric pole no.HAFO1/035 is the bulb is hanging.

5) At a distance of 29 ft between the electric pole no. AFO1/035 and front road near the accident spot

tyre marks could be seen on the middle of the road.

6) From the road divider in front of the electric pole

no.HAFO1/03 till the accident spot at a distance of 70 ft tyre marks could be seen".

It can also be noticed from the said panchnama Exhibit 28 that the distance of the front wheel of the truck parked and the west side of the divider of the road is 22 ft. In other words an area of nearly 22 ft was obstruction free towards the divider of the road. The tin sheds were on the footpath.

57. P.W. 3 to P.W 10 are the injured persons who merely stated about their injuries caused due to accident as they obviously could not see anything about the occurrence of the accident as such. Out of these, Srinivas (P.W.5) and Mallikarjun (P.W.10) are only 15 years of age and as they were not even able to understand the questions, the court did not even administer oath to them. These injured persons have spoken about their injuries as reflected in medical certificates (Exhibits-. 33 to 40). Prema (P.W. 7) had become unconscious by seeing the scene.

58. Despite the above evidence the learned trial judge found the accused not guilty either of offence under section 304 Part II of the IPC or under section 338 of IPC. The factors which weighed with the learned trial judge were casual investigation on certain issues, the prosecution having failed to establish that the accused was under influence of liquor and mainly that the knowledge cannot be gathered from the circumstances as the alleged incident took place during the late night and nobody would know that the persons are sleeping on the footpath. The judgment of the trial court, besides ignoring material pieces of evidence has also fallen in error of law as is clear from the various paragraphs thereof. The trial court records a finding that the vehicle was driven at a high speed and that there was heavy damage to the vehicle. These are attendant circumstances and while referring to the statement of the accused under section 313, can attribute rashness and negligence in his driving the vehicle. The trial court also notices various judgments of the Supreme Court and the High Courts in paragraph 25 thereof to refer as to how circumstantial evidence has to be looked into and how the chain has to be established. The trial court also records that while considering the case of an accident one has to

consider the circumstances which carry more weight as man may speak lie but the circumstances never. Applying the doctrine of Res-ipsa-Loquitor the trial court proceeds to record its findings.

59. Onus of proving negligence as constituent of offence lies upon the prosecution, it is equally true that the *Res ipsa loquitur* is the established doctrine for attributing knowledge of consequences in case of negligence and the accident itself. Where the accident is admitted a reasonable explanation equally consistent with the accident, without there being negligence or attributability of knowledge is also relevant consideration. In the case of *Thakur Singh* vs *State of Punjab*, (2003) 9 SCC 208, where the Supreme Court was concerned with a case under section 304 A, the Supreme Court applied the doctrine of *Res ipsa loquitur* and held that this doctrine comes into play and the burden shifts on the man who was in control of the automobile to establish that the accident did not happen on account of any negligence on his part. A reference in this behalf can also be made to the case of *Mohammed Aynuddin @ Miyam* vs *State of A.P.*, (2000) 7 SCC 72.

60. We have already noticed that the accused in his statement

under section 313 admitted not only the accident but had also understood the case of the prosecution, however, failed to offer any plausible explanation, which, even in remote probability can be taken to be genuine or correct explanation for the happening of the events. According to him there was failure of engine, despite which he drove the car, which resulted in an accident. According to him he made attempts to stop the car by applying the brakes but no purpose was served. He led no evidence on this point and secondly this version is totally falsified by the statement of the eye witnesses. According to the vehicle inspector P.W.15, the brake paddle was intact and working even after the date of occurrence. The evidence of Police Inspector P.W. 17 also supports this fact. According to Investigating Officer (P.W.17), she had taken the car in possession and did not notice anything what was stated in the statement under Section 313 of the Code regarding engine and in fact even in her cross examination no such suggestion was put to her. The explanation rendered is in clear contradiction even to the circumstances and the situation existing on the site. The learned counsel for the accused with some force argued that there are serious lacunae in the investigation of the case and proving of the case by the prosecution before the court. These short falls or

lacunae are fatal to the prosecution case and as such the accused would be entitled for acquittal. According to her no site plan was prepared, no proper recovery memos were prepared, articles were not seized, photographs have not been proved in accordance with law as well as the Vehicle Inspector has not given any opinion as to the cause of the accident. There are various doubts appearing in the case of the prosecution and the accused thus cannot be convicted either for the offence under sections 304 Part II or 304 A of IPC. In support of her contentions she relied upon the judgment in the case of *Thana Ram Sukhu Ram* vs *State of Haryana*, 1996 Cri.L.J. 2020, and *Suresh Chaudhary etc.* vs *State of Bihar*, AIR 2003 SC 1981.

61. It was further argued on behalf of the accused that the prosecution cannot take the advantage of the weakness of the case of the defence and even if dishonest defence is revealed it will not shift the onus and the obligation is upon the prosecution to prove its case and even the statement of the accused under section 313 of the Code cannot take the place of evidence. Reliance is placed on the cases of *Kanti Prasad* vs *State (Delhi),* 1971 (77) Cri.L.J. 1241, *State* vs *Sheikh Kadher*, 1991 Cri.L.J. 3208 and *Bhagirath* vs *State of M.P.,* AIR 1976 SC

975. As far as the statement of the accused under section 313 of the Code and its extent or effect on the case of the prosecution is concerned, we have already discussed this issue at great length herein above. Now we will proceed to discuss the other contentions of the accused. True, it is that the prosecution cannot take the advantage of the weakness in the case of the defence but wherever defence taken by the accused is dishonest or is patently untrue, it would add the element of credibility to the case of the prosecution, particularly when the answers are recorded in the statement of the accused under section 313 of the Code. This goes in consonance with the case made out by the prosecution. Furthermore, there cannot be any straight jacket formula to apply even the settled principle of law uniformly to every case and it will always depend upon the facts and circumstances of each case and the evidence brought on record. We have discussed the evidence of the prosecution at great length. It is clear that the prosecution has been able to prove its case beyond reasonable doubt. According to the investigating officer P.W. 17 the site map was prepared by her, however, the same was not exhibited on record. In face of the panchnama where what was existing on the site was noticed in the presence of panchas, distance of various spots at the place of

occurrence including distance of the divider from the vehicles parked, distance between the divider and the road, end of the road and the place or spot where the deceased were lying have been shown in Exh 28 panchnama. This evidence is further supported by the 33 photographs taken on site of accident and which are exhibited as Exh. 30 collectively. They also corroborate the case of the prosecution. These 33 photographs also include the photograph of injured which were taken in the hospital by P.W. 12. The photographs were proved in accordance with law and we see no reason why they ought not to have been taken into consideration by the trial court. Negatives of these photographs were proved on record with positives. The question that was asked to this photographer P.W.12 was whether the photographs (7 in number) were taken by him and they did not match with the photographs given along with the charge-sheet. This question would no way affect or attach falsehood to the testimony of this witness as there were two sets of photographs, one taken by the photographer at site and hospital (33 in number) and the second which were taken by the Vehicle Inspector P.W. 15 (7 in number) which were part of Exh.42. It is also not correct that the articles were not properly recovered from the site and sealed in accordance with the prescribed procedure. Panchas

P.Ws. 11 and 16 have clearly stated in their evidence that the articles were taken in custody by police in their presence and they were sealed. It is also an admitted position that the seals were intact. This statement of witnesses is fully accepted and explained by Investigating Officer (P.W.18). There is no reason for the court to doubt the testimony of the panchas, eye witnesses and the Investigating Officer. In fact most of the witnesses of the prosecution were hardly cross examined, much less materially, and wherever they were cross examined to some extent, no suggestions or factors which can reasonably demolish the case of the prosecution were put to them. The accused in fact took no objection or protest during the entire trial and even did not raise any objection in his statement under section 313 as to non providing of any documents. According to the accused he had fully understood the case of the prosecution and the entire evidence. Despite the fact that he admitted the accident he offered to render explanation which was ex-facie unbelievable and no way was supported by the things appearing on the site. The stand taken by the accused was beyond even remote probability, in as much as if the vehicle had already developed mechanical defect and engine had stopped while he was driving on the road itself, then there ought to have been some marks of dragging of the

engine, wheel or other iron parts of the vehicle on the road. This is nowhere shown by the spot panchnama, facts on record, and the evidence of any of the material witnesses. In fact it was not even suggested to any of the prosecution witnesses, including the eye witnesses that the car had developed defect while being driven on the road at any time prior to the accident.

62. Every lacunae in the case of the prosecution necessarily need not prove fatal to the case of the prosecution. It is also settled principle of law that every irregularity even if committed in the case of the prosecution by itself in all cases necessarily need not prove fatal to the case of the prosecution. Similarly every contradiction or variance appearing in the statement of witnesses would not per se entitle the accused to an order of acquittal. In the case of *Leela Ram (D) through Duli Chand* vs *State of Haryana and anr.,* AIR 1999 SC 3717, the Supreme Court has cautioned the courts that the appellate court has to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of

evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise. Still in another case of *Visveswaran* vs *State* (2003) 3 SCC 73, where the Supreme Court was concerned with the question that identification parade was not held and there were deficiencies or irregularities in the investigation, the court held that it would not necessarily lead to rejection of the case of prosecution, if it is otherwise cogently proved. In the case of *Karnel Singh* vs *State of M.P.*, (1995) 5 SCC 518 the court, despite the fact that there was improper investigation held as under:

> "5. Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating office if the investigation is designedly defective. Any investigating officer, in fairness to the prosecutrix as well the accused, would have recorded the statements of the two witnesses and would have drawn up proper seizure memo in regard to the "chaddi". That is the reason why we have said that the investigation was slipshod and defective.
>
> 6. We must admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to

> help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury".

63. A reference can also be made to the judgment in the case of *Zahira Habibullah Sheikh and anr.* vs. *State of Gujarat and ors.* (2006) 3 SCC 374. The Supreme Court stressed upon the need of more fundamental approach which is in consonance with the Criminal Procedure Code and the Indian Penal Code and also with the fact that fair trial of criminal offences consists not only technical observance of the frame and forms of the law but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. The court held as under:

> "22. The complex pattern of life which is never static requires a fresher outlook and a timely and vigorous moulding of old precepts to some new conditions,ideas and ideals. If the court acts contrary to the role it is expected to play, it will be destruction of the fundamental edifice on which the justice delivery system stands. "Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking; "The Judge was biased". (Per Lord Denning, M.R. in Metropolitan Properties Co Ltd, v Lannon, (1968) 2 All ER 304, All ER p. 310 A).The perception may be wrong about the Judge's bias, but the Judge concerned must be careful to see that no such impression gains ground.

> Judges like Caesar's wife should be above suspicion (Per Bowen, L.J., in leeson v General Council of Medical Education- (1890) 43 Ch D 366.
>
> 40. "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and social interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed wold under time and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution..."

64. In light of the above stated principles it can safely be recorded that every irregularity or contradictions or non proving of documents

per se would not vitiate the case of the prosecution and entitle the accused to an order of acquittal. The accused essentially must show that it was not mere procedural irregularity but was in fact illegality offending the rule and regulations, provisions of law and besides that the accused had suffered some prejudice. In this case nothing of this sort is shown by the accused.

65. One of the main arguments raised on behalf of the accused was that the prosecution has no way proved that the accused was drunk or under influence of liquor. Even medical evidence in this regard has also not been proved in accordance with law. This argument is again without any merit. The Investigating Officer (P.W.17) has clearly stated that she had taken the accused in custody, taken him to the hospital and his blood sample was taken by the doctor and sent for Chemical Analysis. Dr. Barve P.W.1 has also stated that he had taken the blood sample of the accused and found him in drunken condition. After the blood and urine samples were subjected to analysis, Exhibit 48, was the report received from the Director, Forensic Science Laboratory and Chemical Adviser to Government wherein it was stated that bottle with seal intact was received, contents of which showed 42% v/v of ethyl

alcohol in water. It was not a medicinal/antiseptic/ toilet preparation, nor a flavouring material. Exhibit 49, the report of the Chemical Analyser of the analysis of blood sample of accused which was received in seal intact condition states that "the blood contained ---0.112--percent W/v of ethyl alcohol.". Common Exhibit 49 was given to these blood and urine test reports. The urine test result indicated that "the urine contained --0.056-- percent W/v of ethyl alcohol". This was the ocular and documentary evidence produced by the prosecution to show that the accused was drunk while driving the vehicle which met with an accident. In accordance with the provisions of section 66(1)(b) of the Bombay Prohibition Act, 1949 if it is proved that the concentration of alcohol in the blood of the accused person is not less than 0.05 per cent, weight in volume, then he would be deemed to have committed offence, unless he proves otherwise. During the cross examination of the prosecution witnesses not even a suggestion was made at any point of time that the accused was not drunk or was not driving under influence of liquor.

66. The mere fact that in the entire case of the prosecution there are insignificant or inconsequential drawbacks or lacunae, that by itself would not be sufficient to disbelieve the prosecution case in its entirety

particularly when it led sufficient evidence to substantiate the charge. The default of the prosecution or some element of irregularity in its investigation or presentation of case before the Court again would not substantially jeopardize the interest of the prosecution, if the accused has not suffered any prejudice or has not been denied fair trial and particularly when prosecution has led ocular and documentary evidence which is sufficient to hold the accused guilty of the offence. Right from the case of *Shivaji Sahabrao Bobade* (1973) 2 SCC 793, the test of prejudice to the accused has been consistently followed by the Courts. Even prior thereto, the Supreme Court clearly indicated that every non-compliance to the provisions of the Evidence Act, or Criminal Procedure Code at the stage of investigation would not destroy the case of the prosecution in its entirety. Like every suspicion is different from guilt so also every irregularity is different from a consequential illegality coupled with the element of prejudice. The argument on behalf of the accused that non-compliance of the statutory provisions prescribed in the Rules framed under the Bombay Prohibition Act would vitiate the trial is also without merit. Firstly, though the accused was not charged for an offence punishable under Section 66 (1) (b) of the Bombay Prohibition Act, both parties stood to the trial without any protest. In our opinion

and for the purpose of the present case relevant provisions of law have been substantially complied with. The blood sample was taken by the Medical Officer and it was examined by the Chemical Analyser as per the Rules and procedure. Similarly, because the sample was carried by a Police Officer and not by the Medical Department would not vitiate the report or its content. Reliance on some of the cases cited on behalf of the accused to substantiate the plea that in such accident cases only offence that would be made out would be Section 304A of the IPC, is without substance and merit. Every case has to be examined on its own facts. Heavy reliance was placed upon the judgment of the Supreme Court in the case of *Prabhakaran* vs. *State of Kerala (* 2007 AIR SCW 4227). It is argued that the present case at best would fall under Section 304A and not under Section 304 Part-II IPC. In fact, it is also contended that even conviction under Section 304 A of the IPC is bad-in-law, inter alia, on the aforenoticed ground and also on the fact that no knowledge would be attributable to the accused. The case of *Prabhakaran* (supra) is on its own facts. In the said case, the Court was concerned simpliciter with the case of reckless, rash or negligent driving. There was no circumstance justifying the inference of knowledge that his act was likely to cause death. In that case neither

the driver was drunk nor there were any attendant circumstances that driver had already, to his knowledge, committed other offences. Even in that case, the Supreme Court while drawing a distinction between the provisions of Section 304A and 304 Part II stated thus:

> "…….… This section applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death".

67. Certainly, to attract rigors of Section 304 Part-II knowledge is of paramount consideration which obviously has to be inferred from the circumstances and the evidence on record. In the present case, the entire conduct of the accused puts the case of the prosecution beyond reasonable doubt that the knowledge was attributable to the accused on the grounds that he was driving the car in drunken condition at a very high speed, making noise of the tape recorder on high volume in the car, failing to control the vehicle and the vehicle could not be stopped before it crushed seven people to death and injured other eight and then even climbed upon the wooden logs which were lying in the huts as is clear from the photographs on record. Even before the accused started driving the car he would be deemed to be aware of the law that it is an

offence to drive a vehicle under the influence of liquor and even to carry liquor in the car. The distance between the divider and the vehicles which are stated to be parked at the edge of the road was 22 ft. or more which obviously means that the accused had more than 22 ft. wide road for driving and in the normal course of driving there could be no occasion for a driver to swing to the left and cover a distance of more than 55 ft., climb over the footpath and crush poor persons sleeping on the footpath. It is a matter of attributing specific knowledge of a particular event. These are matters of common knowledge and hardly anybody could plead ignorance thereto. The extent of alcohol in the blood and urine of the accused sufficiently indicates that he was undoubtedly under the influence of liquor. In fact, his statement made under Section 313 to some extent is in line with the case of the prosecution. The drawbacks or flaws of the prosecution in not filing the site plan, that the statement of the panchas not being in conformity with the record and spot panchanama was not proved in accordance with law would entirely be inconsequential. We have already discussed at length that these aspects of the case have duly been proved by the prosecution.

68. When knowledge of the existence of a particular fact is an

element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist (Section 202 of Indian Penal Code, 1860). In such a case it is difficult to construe the expression ` knowledge' equitable to “actual knowledge” as it even includes knowledge of likelihood of death or injury, which is likely to cause death. Thus the actual knowledge as an absolute term could hardly be attracted in such cases. As a matter of fact, the provisions admit of cases where it is not necessary to establish actual knowledge of the act and the consequences thereof. These principles have to be analysed with the standard of ` normal human conduct of a person of common prudence'. The knowledge would be a matter of fact to be inferred from the facts and circumstances of a case. In the present case the knowledge would be attributable to the accused as any person of common prudence would be deemed to have knowledge that he is not to drive the vehicle in drunken condition and that too at such high speed and in the manner as the accused was driving the vehicle. He not only offended the law but even a social duty. It is a matter of common knowledge or phenomenon of life in Mumbai that persons live on footpaths. Besides this fact of common knowledge, the accused was also aware of the fact that people were sleeping on

footpath at place of occurrence of the incident, because he passed through that way few minutes earlier and that he is resident of same area as is evident from the evidence on record. Callous attitude, rash and negligent driving with high speed is also evident from the evidence on record as also that the vehicle was being driven with loud noise and playing tape recorder at a very high pitch as well as the vehicle could not come to a halt before it ran over 7 persons sleeping on the footpath and injuring 8 others also sleeping on the footpath and before climbing over wooden planks (logs) and even dashed into the huts of the labourers.

69. The law imposes certain duties on the accused as well as ordinary human prudence requires the accused not to drive the car under the influence of liquor and in callous and negligent manner. The likelihood that while driving the car the accused could not concentrate on driving is obvious from the evidence of the complainant at Exhibit 13 and the photographs at Exhibit 30.

70. Be that as it may, once the accused admits the accident, then to offer a plausible explanation as to how accident occurred was

obligatory upon the accused. (Refer *Thakur Singh* & *Mohammed Aynuddin Miyam* (supra)). The explanation rendered by him that there was something wrong with the engine of the car is a falsehood and an afterthought since it does not stand to any reason. As already noticed, if the vehicle had developed a defect, mechanical or otherwise, it should have stopped on the road itself or at least there would have been some marks of tearing on the tar road. Two photographs (Exhibit-30) show the tyre brake mark on the road which indicate that an effort was made to apply the brakes where the road was taking a curve. The spot panchanama (Exh.28) shows that from the road divider in front of electric pole No. HAF 01/035 the distance of the accident spot is 70 ft.. That is an indication as to at what speed and to what extent the car was driven in a rash and negligent manner. The argument that because of the parking of the vehicles on the side of the road, the accused could not have seen nor had knowledge of people sleeping on the footpath is an argument of desperation. As per the statement of Complainant (PW2) at Exhibit-13, the car had first gone towards other side from Carter Road when it was noticed by him that the driver was driving the car with high speed with music on and the occupants were making noise. When it came back towards the other side i.e. Bandra

direction, it met with the accident. In other words, the accused would have in any case seen the persons sleeping on the footpath and the hutments before he even came back from that side. Another aspect reflecting knowledge of the accused is that the accused is also a resident of the same locality. The statement of the accused recorded while explaining the contents of charge as well as while recording his statement under Section 313 of the Cr.P.C. would clearly show the address of the accused as “Silvaraj, 43, Carter Road, Bandra, Mumbai-400 050”. The factum of high and reckless speed is further evident from the fact that as per prosecution evidence, the road had a small curve from where the accused appeared to have lost control of the car and the speed was such that he could not even stop the car after applying brakes and went on to crush the persons sleeping on the roadside.

71. What else would be ‘knowledge’. It cannot be said that the accused had no knowledge that his reckless and negligent driving in a drunken condition could result in serious consequences of causing a fatal accident. The learned trial Court did not even venture to discuss the direct evidence available on record in regard to essential ingredients

of an offence punishable under Section 304 Part-II. Ignoring definite evidence on record in two sentences, it recorded a finding of acquittal for the offence for which the accused was charged. In our considered opinion, the accused had the knowledge and such knowledge in any case would be attributable to him that his actions were dangerous or wanton enough to cause injuries which may even result in the death of the persons.

72. As an appellate Court, the High Court can even convict an accused for an offence for which the accused was not charged before the trial. The appellate Court is competent to give effect to its own independent conclusions on the record before it. Reference in this connection may be made to the judgments in (i) *Ramaswamy Nadar* vs. *The State of Madras*, AIR 1958 SC 425, and (ii) *Surjan* vs. *State of Rajasthan*, AIR 1956 SC 425. In the case of *Ramaswamy Nadar* (supra), while referring to the judgments of the Privy Council in the cases of *Emperor* vs. *Ismail*, AIR 1928 Bom. 130 and *Begu vs. Emperor*, AIR 1925 PC 130, the Apex Court observed as under:-

> "6.... .... It is open to the High Court to convict the accused of any offence disclosed in the evidence other than that with which he had been charged "

In the case of Surjan (supra), the Apex Court observed thus:-

> "Learned counsel for the appellants next submitted that assuming that the Judgment of the learned Sessions Judge was not satisfactory, the judgment of the High Court reversing the acquittals was not what it should have been. He urged that the learned Judges have not judicially applied their mind to the appreciation of evidence but that all that was done was to look at and set out only the evidence in the examination-in-chief of each of the prosecution witnesses without noticing and taking into consideration the material brought out in cross-examination to discredit such evidence.
>
> It is also pointed out that the individual guilt of each of the accused was determined by merely cataloguing how many eye-witnesses spoke against each of the accused. On a careful perusal of the judgment of the High Court we cannot help feeling that there is room for the above criticism. This is not, however, to say that the learned Judges did not in fact scrutinise and appreciate the evidence.
>
> But that owed it to themselves, when reversing acquittals that their judgment should clearly set out and discuss the evidence of the eye-witnesses as against each of the accused succinctly and categorically, instead of merely cataloguing a summary of the evidence of each prosecution witness and an enumeration of all who spoke against each accused."

73. The evidence on record and the attendant circumstances would justify "attributability of actual knowledge" to the accused,

inasmuch as, he had passed through that road before accident. Besides this matter of common knowledge, there is definite ocular, documentary and circumstantial evidence on record to bring home the guilt of the accused under Section 304 Part-II of the IPC. Furthermore, it is a case where the prosecution case is partially supported by the statement of the accused and on top of it, the cross examination of the prosecution witnesses does not establish any consistent line of defence. No suggestions were put to any of the witnesses to demonstrate that they were deposing incorrectly or what they had stated on oath suffered from the vice of contradiction, falsehood or even was unreliable. These are three determinative factors which persuade us to hold that the trial Court has fallen in gross error of law in acquitting the accused of the charge under Section 304 Part-II.

74. It is evident from the judgment that accused was also acquitted of the charge under Section 338 of the IPC. This finding of the trial Court again is not in consonance with the settled principles of law if examined in the light of the evidence on record. All the injured were taken to the hospital by P W 11 and were examined by Dr. Nitin Vishnu Barve (P.W.1). The injuries over the right front temporal

parietal region of the size of 5 x 3 cm. with scalp deep with bleeding suffered by two injured persons viz. Jagan Kumar Shingaram (Medicial Certificate Exh. 33) and Mariamma Sijamani (Medical Certificate Exh. 37) could not be said to be simple injuries. Under Section 320 of IPC, an injury which results in permanent disfiguration of the head or the face would be a grievous hurt. This could with a little more gravity prove even fatal. No suggestion was made to the doctor that the medical certificates issued by him (Exhibits-33 and 37) were not correct and/or that the injury suffered by injured were simple injuries. Furthermore, another injured person, Sigmani Harijan, Shakuraphani had suffered suspected fracture of mela carpus. Besides that, the injured suffered pain and tenderness over the chest and swelling over right hand. These injuries are also reflected in some of the photographs at Exhibit-30. In these circumstances, the accused has to be held guilty of an offence under Section 338 of the IPC qua the above mentioned injured persons who sustained grievous hurt and under Section 337 qua other injured persons who suffered simple hurt. In our considered opinion, the present case is certainly not one of simpliciter rash and negligent driving. The evidence on record clearly shows greater culpability and

the circumstantial evidence sufficiently indicates attributability of knowledge to the accused of persons sleeping on footpath and probability of the fatal accident. It is also clear that imputability arises when acts of negligence, rashness and recklessness are done with the knowledge of its consequences and where the circumstances show that the accused has not exercised the caution incumbent upon him. If he would have had the conscience, he would have exercised the caution. Breach of a legal and even a civil duty of circumspection would add to the element both of imputability and knowledge. In the present case, the accused not only neglected the legal and civil duty and drove the vehicle under the influence of liquor but also drove the car in a reckless and negligent manner being aware of his obligation towards the safety of persons sleeping on the footpaths. The very fact that he drove the car under the influence of liquor at a very high speed with loud music and making noise while driving are the pieces of evidence and attendant circumstances, which would attribute the knowledge to the accused that his act could produce fatal result of losing control over the car and could injure persons sleeping on the footpaths or even could cause their death. It is also a matter of common knowledge that the labourers sleep on the footpaths not of

their option but of compulsion of poverty and no shelter on their heads.

75. Documentary, ocular and expert evidence, as referred to above, clearly shows that the accused committed offence of culpable homicide not amounting to murder with the knowledge that the acts/injuries caused by him, seen in the light of manner in which he drove the car with high speed and callousness under the influence of liquor, would cause death or are likely to cause death. In fact, it caused death of 7 labourers. He also caused grievous hurt to other persons. We accordingly hold him guilty of the offence punishable under Sections 304 Part-II, 338 and 337 of the IPC and set aside the order of acquittal recorded by the trial Court.

V. Sentence and plea of probation

76. Having rejected the contentions raised on behalf of the accused and recording the finding of guilt of the accused under Section 304 Part II, Sections 338 and 337 of the IPC, now we proceed to

discuss the question of quantum of sentence and request of the accused for release on probation. According to the learned counsel appearing for the accused, the accused is a young person and was driving his vehicle with due care and caution. The accused had already paid Rs. 5 lakhs as fine and another sum of Rs.3.5 lakhs on account of compensation. Considering the age of the accused, minimum sentence should be imposed upon him and in any case he should be released on probation. Reliance was placed upon the judgment of the Supreme Court in the case of *Bhalchandra Waman Pethe* vs. *State of Maharashtra,* 1967 DGLS 316. Reliance was placed upon the following observations of the Supreme Court:

> "8. This takes us to the question of sentence. The trial magistrate after considering the various aspects of the case came to the conclusion that it was not necessary in the interest of justice to impose on the appellant a sentence of imprisonment. He thought that the ends of justice would be met by imposing a heavy fine on him. The High Court in the exercise of its revisional jurisdiction has altered the sentence as mentioned above. What sentence should be imposed in a given case is essentially within the discretion of the trial Court. The High Court would not be justified in interfering with that discretion unless it is satisfied that the sentence imposed by the trial Court is unduly lenient or in other words grossly inadequate. In Alamgir and another vs. State of Bihar, this court explained the law on the point thus:
>
> > "It is unnecessary to emphasize that the question of sentence is clearly in the discretion of the trial Judge.

> It is for the trial Judge to take into account all the relevant circumstances and decide what sentence would meet the ends of justice in a given case. The High Court undoubtedly has jurisdiction to enhance such sentence under Section 439 of the Code of Criminal Procedure; but this jurisdiction can be properly exercised only if the High Court is satisfied that the sentence imposed by the trial Judge is unduly lenient or, that, in passing the order of sentence, the trial Judge had manifestly failed to consider the relevant facts. It would not be right for the appellate Court to interfere with the order of sentence passed by the trial court merely on the ground that if it had tried the case it would have imposed a slightly higher or heavier sentence."

10. The trial Court thought that the ends of justice would be met if the appellant was made to pay heavy fine. The High Court did not give any reason for coming to the conclusion that a sentence of imprisonment is imperative in this case. The High Court appears to have been influenced by the fact that a human life had been lost. If that is so, it had clearly lost sight of the fact that causing death is a necessary ingredient of an offence under Section 304A Indian Penal Code. Yet the legislature in its wisdom has left it to the discretion of the Courts to punish an offence under that section either with imprisonment or with fine or both. From that it is clear that the legislature did not consider that for an offence under Section 304A Indian Penal Code, a term of imprisonment is a must. On the other hand it did visualize the possibility of an offence falling under that provision being penalized by mere fine. It is highly regrettable that the incident in question resulted in the death of a young person but the High Court should not have allowed itself to be prejudiced by that circumstance."

77. The above observations of the Supreme Court would hardly

have any application to the present case on the principle of *ratio decidendi*. The above dicta could hardly have any application to the facts of the present case. Here the trial Court has already acquitted the accused, whereas this Court had found him guilty of an offence under Section 304 Part II of the IPC. Furthermore, here seven human lives were lost, there was loss of earning of some of them as the entire families were dependent on them and other eight persons suffered injuries.

78. Awarding of sentence again is a very careful exercise of power and jurisdiction by the Court. Sentence should be proportionate to the gravity of the offence and should also have a deterrent effect. While taking a serious view of a head-on collision of a lorry driven by the accused with a car resulting in the death of four occupants of the car and interfering with the quantum of sentence awarded by the High Court, the Supreme Court in the case of *State of Karnataka* vs. *Sharanappa Basanagouda Aregoudar, (*2002) 3 SCC 738, held as under:-

> "We are of the view that having regard to the serious nature of the accident, which resulted in the death of four persons, the learned Single Judge should not have interfered with the sentence imposed by the courts below. It may create and set an unhealthy precedent

> and send wrong signals of the subordinate courts which have to deal with several such accident cases. If the accused are found guilty of rash and negligent driving, courts have to be on guard to ensure that they do not escape the clutches of law very lightly. The sentence imposed by the courts should have deterrent effect on potential wrongdoers and it should commensurate with the seriousness of the offence. Of course, the courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system".

79. Imposition of sentence should be commensurate with the seriousness of the offence. It is not possible to evolve a foolproof process of sentencing, as it will always depend on factual matrix of a given case. Aggravating and mitigating circumstances should be delicately balanced. The quantum of punishment is relatable to the evidence on record and the attendant circumstances (See *Shailesh Jasvantbhai and another* vs. *State of Gujarat and others* (2006) 2 SCC 359). The Court has to calibrate the need for punishment to be deterrent and still not to be unnecessarily harsh with reference to a particular event. Merely that the accused is of a young age or that he has paid heavy fine would not by itself be material consideration in

determining the quantum of sentence. It is difficult to answer such propositions by exactitude as intricacies of appreciation of evidence and their deterrent effect on social fabric of the society is an impalpable issue and would differ with reference to the facts of a given case. There are so many aggravating circumstances in the present case but hardly any mitigating circumstances. No circumstance has been brought on record, much less proved in accordance with law by the accused, which could even remotely suggest that the accident was the result of any factors beyond the control of the accused. In his wisdom, the accused chose not to put such circumstances in the cross-examination of any of the material witnesses nor lead any evidence. For these reasons, it will be quite difficult for the Court to take any lenient view and impose meagre punishment upon the accused, as contended on his behalf.

80. The learned Counsel appearing for the accused had strenuously argued that since the accused has paid heavy fine no fruitful purpose would be served by sentencing the accused to imprisonment. The accused is not likely to commit such offence again

and, in fact, would ensure that he does not indulge in such activity. To buttress this submission, reliance is placed upon the judgments in (i) *Baljit Singh* vs. *State of Punjab*, 1995 Cri. L.J. 3819, (ii) *Aitha Chander Rao* vs. *State of Andhra Pradesh,* 1981 Ind Law SC 597, and (iii) *Alankar Rawat* vs. *State of Maharashtra (*Criminal Appeal No.1146 of 2006, decided on 22nd June, 2007 by the Bombay High Court).

81. The Supreme Court in the case of D*albir Singh* vs. *State of Haryana,* AIR 2000 SC 1677, had clearly enunciated the principle that the provisions of Section 4 of the Probation of Offenders Act may not be extended to persons convicted even for an offence under Section 304A of the Code causing death by rash and negligent driving. It was held that the word “expedient” had been thoughtfully employed by the Parliament in the Section so as to mean it as an act suitable to the end in view. The beneficiary provisions should be applied, keeping in view the circumstances of the case and the nature of offence. Where the provisions of this special enactment vest the Court with the power, then it also confers a duty upon the Court to exercise such discretion circumscribed by the settled principles of law. The word “expedient” in its common parlance would mean convenient and practical. In other

words, it may be suitable or appropriate. The Law of Lexicon, 1997 Edition, explains the word as under:-

> *" In one sense, "expedient" (adj.) means "apt and suitable to the end in view", practical and efficient," "polite", "profitable", "advisable", "fit", proper and suitable to the circumstances of the case". In another shade, it means a device "characterised by mere utility rather than principle, conducive to special advantage rather than to what is universally right."*

82. In this connection, a reference can usefully be made to the decision of the Punjab & Haryana High Court in Criminal Revision No.609 of 1995 (*Rajesh alias Pappu* vs. *The State of Haryana)* dated 7th September, 2005. In the said case, the Court held as under:-

> The courts have emphasised that sentencing an accused person is a sensitive exercise of discretion and not a routine or mechanical prescription acting on hunch. The courts are required to collect material necessary to award just punishment and also to apply its ;mind to the facts and circumstances of the case whether an accused/convict can be given the benefit of the provisions of section 360 Cr.P.C. Or the provisions of Probation of Offenders Act. The Supreme Court in the case of Ved Parkash vs State of Haryana,m AIR 1981 S.C. 643 while emphasising the need of dealing with the offenders in such a manner that he becomes a non-offender, observed as under:
>
> > "We emphasis this because the legislations which relate to amelioration in punishment have been regarded as `Minor Acts' and, therefore, of little consequence.,

> This is a totally wrong approach and even if the Bar does not help, the Bench must fulfill the humanising mission of sentencing implicit in such enactments as the Probation of Offenders Act".

In a very recent case titled as A.P.Raju vs The State of Orissa, 1995 SCC 675, the Supreme Court while dealing with a case of death by rash and negligent driving under section 304 A of the Indian Penal Code, held as under:

> "Taking in view all these factors, in our opinion, the interest of justice would be met if instead of now sentencing the appellant to serve a term of imprisonment and sending him to prison again, we order his release under section 360 Criminal Procedure Code on the appellant's entering into a bond with one surety to keep good conduct and be of good behaviour and keep peace for a period of one year from the date of execution of the bond., We make an order accordingly. The bond shall be executed by the appellant within one month from today before the trial court. With the above modification of sentence, the appeal is disposed of".

The Courts, therefore, have to draw a balance between the chances of the offender becoming a non-offender and minimising the chances of such an offender repeating commission of such offences on the one hand and, on the other hand, from the accused drawing a premium over the commission of the offence, in the event the accused is granted such benefit. This would depend upon various factor which have been settled by various pronouncements of all Courts and they form kind of guidelines for the Courts to strike this balance.

> There can be no two opinions that the benefit of sections 360 and 361 of the Criminal Procedure Code and the provisions of Probation of Offenders Act can neither be granted as a matter of rule nor can be declined as a matter of rule. Each case must be dealt with on its own merits".

83. Thus, in light of the above principles, the Court has to examine whether, in the facts and circumstances of the case and while keeping in view the seriousness of the offence and particularly the manner in which it was committed, it would be expedient and helpful in serving greater public good, rather than microcosmic individual interest of the accused, to grant benefit of these special provisions to the accused. No mitigating factors or special circumstances have been brought on record by the accused which may tilt the balance of this benefit in favour of the accused, rather than requiring him to undergo the awarded sentence. Reformative concept of sentencing policy known to criminal jurisprudence sometimes does require that a person may be released on probation rather than compelling him to undergo imprisonment as it will serve greater benefit by reforming the person. This view is possible only when the offence is result of an innocent act or even where an offence is committed for reasons beyond the control of the accused. It is for the accused to offer a plausible explanation

particularly when he chooses to admit part of the prosecution story. In the present case, there has been no attempt on the part of the accused to establish on record any such factors. On the other hand, the record of the case exhibits most callous attitude on the part of the accused. He acted in a most irresponsible manner, breached not only law but even social obligations and failed to take requisite precautions/cautions and drove the car in a rash and negligent manner. Release on probation is not an indefeasible right of the accused. The Court has to examine various factors, circumstances and keep in mind all the relevant considerations while considering application of probation (See *Arvind Yadav* vs. *Ramesh Kumar and others*, (2003) 6 SCC 144). Thus, in the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that it is neither proper nor expedient to release the accused on probation. So we decline to grant this benefit to the accused.

84. The State has relied upon the judgment of the Supreme Court in the case of *Dalbir Singh* vs. *State of Haryana and others,* AIR 2000 SC 1677 where the Supreme Court held that automobiles have become deathtraps. Any leniency shown to the drivers who are found

guilty of rash driving would be at the risk of further escalation of road accident. In the case of *Sadha Singh and another* vs. *State of Punjab,* 1985 (3) SCC 225*,* keeping in view the facts of the case where the accused was found guilty for an offence under Section 307 of the IPC, the Supreme Court has held that the sentence is a matter in the discretion of the trial Court to be exercised on sound judicial principles and reduction of sentence by enhancing fine by the High Court would not be a proper approach. While enhancing the sentence, the Supreme Court held as under:

> "8..... .... The offence committed by the appellants is proved to be one under Section 307 of IPC punishable with imprisonment for life. We were told that the appellants had hardly suffered imprisonment for three months. If the offence is under Section 307 IPC i.e. attempt to commit murder which is punishable with imprisonment for life and the sentence to be awarded is imprisonment for three months, it is better not to award substantive sentence as it makes mockery of justice. Mr. Jain said that the High Court has enhanced the fine and compensated the injured and, therefore, we should not enhance the sentence. Accepting such a submission would mean that if your pockets can afford, commit serious crime, offer to pay heavy fine and escape tentacles of law. Power of wealth need not extend to overawe court processes. Thus it appears that the High Court wrongly interfered with the order of sentence on wholly untenable and irrelevant grounds some of them not borne out by the record."

85. Thus, the Court has to consider the question of quantum of punishment guided by the accepted precepts of criminal jurisprudence. The punishment inflicted upon an accused should not be so lenient as to result in rendering the administration of criminal justice a laughing stock. It should also not be so harsh that it hurts the judicial conscience. Punishment in substance should be punitive so as to act as a deterrent for commission of such crimes and must be founded on the concept of reasonableness relatable to the given facts and circumstances of the case.

86. It is said that sentencing must have a policy of correction, but essentially it must keep in mind the other side of the concept of punishment for it to be deterrent. The offender must not only realize his mistake but essentially the punishment must get into the frame of mind so that he would not repeat such events. Fatal frequency of rash driving and speeding menace needs to be checked. Any judicial system is founded on an approach, which would achieve the object of establishment of truth. Essentials of fair trial in any jurisprudence would mandate efforts on the part of the Court to reach the truth on the basis of the record before the Court. Where persons are found to be guilty of

offence, the court has to draw a reasonable balance between the victim and punishing the offender while certainly not losing the sight of public interest, which mandates that nobody is above the law and guilty offender should be tried and punished in accordance with law. In the case of Zahira Habibullah Sheikh (supra) the Supreme Court stated that the principle of fair trial now informs and analyses new areas of law. The nature of crime, the person involved in the crime, its impact on society and adherence to the principles governing the administration of criminal justice are some of the factors, which amongst others should be dealt with desirably by the Courts.

87. In view of the above detailed discussion, we hereby set aside the judgment of acquittal recorded by the trial court dated 13th April 2007 and accept the State Appeals. While dismissing the Appeal filed by the accused we hold him guilty of the offences punishable under sections 304 Part-II, 338, and 337 of the IPC. Having discussed in some detail the various aspects on the point of imposition of punishment, we are of the considered view that the accused does not deserve any uncalled sympathy on the question of quantum of sentence. On the Court file, there are ample aggravating circumstances in contrast to the mitigating

ones. Having declined the benefit under the provisions of the Probation of Offenders Act to the accused, we hereby impose the following punishment:

(a) On account of the offence punishable under section 304 Part-II of the IPC, the accused shall undergo rigorous imprisonment for a term of three years and shall be liable to pay a fine of Rs.5 lacs (which as per the previous orders of the various Courts has already been distributed to the families of the deceased/injured);

(b) On account of the offence punishable under section 338 of the IPC for causing grievous injury to two persons, namely Jaikumar Shingaram and Mariamma Shingmanna, the accused shall undergo rigorous imprisonment for a term of one year;

(c) On account of the offence punishable under section 337 of the IPC for causing injury to six persons namely (1) Sinu Damu Harijan, (2) Ramchandra Chakrawarti ,(3) Ramalu Harijan, (4) Malikarjun Bajappa Motermalappa, (5) Prema Chingaram and (6) Sigmani Shankar Pani, we direct the accused to undergo rigorous imprisonment for a term of six months.

(d) All the substantive sentences shall run concurrently.

(e) The period of detention, if any, undergone by the accused during investigation, inquiry or trial shall be set off against the substantive term of imprisonment imposed on him.

(f) The accused is directed to surrender to the authorities forthwith.

88. Resultantly, the Appeals filed by the State are allowed while the Appeal filed by the accused is dismissed.

CHIEF JUSTICE

SMT. RANJANA DESAI, J.